TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 77.

PATRICIO UBEDA, APPELLANT,

vs.

AGAPITO ZIALCITA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED JUNE 14, 1913.

(22,226.)

(22,226.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 321.

PATRICIO UBEDA, APPELLANT,

vs.

AGAPITO ZIALCITA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE I LANDS.

INDEX.

	Original.	Print
Caption	1	1
Bill of exceptions from court of first instance	1	1
Complaint	1	1
Answer and counter-claim	8	4
Demurrer to counter-claim sustained	13	7
Amended counter-claim	13	7
Motion to strike amended counter-claim	14	7
Demurrer to amended counter-claim	14	7
Order sustaining demurrer	15	7
Decision	16	8
Motion for new trial overruled	35	18
Judge's certificate to bill of exceptions	35	18
Clerk's certificate to bill of exceptions	36	18
Notice as to bill of exceptions	36	18
Record of the trial	38	19
Offers of evidence	38	19
Testimony of Agapito Zialcita	40	20
Carlos Palanca	41	21
Antonio Pueo	49	25
Arnold Hollman Queju Pae	52	27
Serafino Palanca	57	29
Patricio Ubeda Gallego	61	31
Miguel Morales	87	45

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 24, 1911.

	Original.	Print
Testimony of Patricio Ubeda (recalled)	94	48
Agapito Zialcita (recalled)	98	50
Plaintiff rests	102	53
Motion to dismiss	102	53
Testimony of George H. Tilbury	105	54
Manuel Iriarte	109	56
Ernest Appel	113	58
Manuel Iriarte (recalled)	126	65
Agapito Zialcita (recalled)	133	68
Plaintiff's Exhibit A—Certificate of trade-mark to Patricio Ubeda Gallego, Dec. 16, 1898, &c.	148	75
B—Letter of A. Zialcita to Patricio Ubeda, August 1, 1905	155	79
D—Labels	156	79
E—Labels	158	80
F—Labels	160	81
G—Label	161	81
H—Certified copy of trade-mark registered by Patricio Ubeda Gallego April 3, 1906, No. 450	162	82
J—Invoice for case of gin	168	84
K—Invoice for case of gin	169	84
L—Contract of account participation entered into between Benito Legarda, as manager of the firm of Tuason, Legarda & Co. and Patricio Ubeda, November 18, 1901	170	85
M—Photograph of award of Hanoy Exposition in favor of Mr. Ubeda	173	86
N—Labels	174	86
I—Letter of secretary of supreme jury of St. Louis Exposition to Patricio Ubeda, November 1, 1904	175	87
Order denying motion to dismiss	177	88
Exception to order denying motion to dismiss	179	89
Exception to order denying motion to dismiss	180	89
Defendant's Exhibit 1—Letter signed "La Rosario," February 1, 1906	181	90
2—Poster	185	90
3—Label	186	90
4—Letter of Patricio Ubeda to Van Den Bergh & Co., Dec. 2, 1904	188	91
5—Letter of Benito Legarda to Van Den Bergh & Co., Oct. 24, 1904	189	91
6—Proceedings relating to the losses suffered by the Royal Economic Society of Friends of the Country as a result of the fire which occurred September 28, 1897	191	92
7—Proceedings relative to the petition of Vicente Trius for a trade-mark for vermouth wines, 1898	198	95

	Original.	Print
Defendant's Exhibit 8—Certificate as to trade-mark of Van Den Bergh & Co.	202	97
9—Trade-mark of Van Den Bergh & Co., No. 3621	204	98
10—Trade-mark of Van Den Bergh & Co., No. 137	210	100
11—Record in interference No. 21506, Van Den Bergh & Co. *vs.* Blankenheym & Nolet	215	103
Index	215*a*	103
Notice to take proofs	215	103
Testimony of Aurelio Carreno.	215-2	105
Stipulation as to proofs	215-9	109
Affidavit of Nicolas Chapuis	215-10	110
Geo. S. Nicholas	215-12	111
Hans v. Briesen	215-14	112
Arthur v. Briesen	215-16	113
Interrogatories to Collart *et al.*	215-18	115
Deposition of Theo. Collart	215-25	118
Raeymaeckers	215-60	139
Defendant's Exhibit 12—Certificate as to trade-mark of Patricio Ubeda Gallego for wine known as "Tres Campanas"	216	144
Bill of exceptions filed in supreme court	217	145
Assignment of errors	217	145
Argument and submission	218	145
Decision	219	146
Exception to decision	230	153
Motion for rehearing	230	153
Order overruling motion for new trial	231	153
Judgment	232	154
Exception to Judgment	232	154
Clerk's certificate	233	154
Petition to send up original exhibits	234	154
Order allowing petition	234	155
Clerk's certificate as to sureties	236	155
Bond	237	156
Citation and service	238	156
Petition for appeal	240	157
Allowance of appeal	242	158
Assignment of errors	243	159

1 No. 4392.

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

TRANSCRIPT OF RECORD.

Proceedings in the Supreme Court.

Bill of Exceptions.

In the Court of First Instance of the City of Manila.

No. 4233.

PATRICIO UBEDA, Plaintiff,
versus
AGAPITO ZIALCITA, Defendant.

Be it remembered, That the following proceedings were had in the above entitled cause:

On January 4, 1906, plaintiff filed in the Court of First Instance of the City of Manila the following complaint:

(Title of Court and Cause.)

"Plaintiff appears and states to the Court:

I. That both he and defendant are merchants of this City, domiciled and residing therein.

II. That for many years prior hereto plaintiff has been and now is engaged in the manufacture and preparation of wines and liquors in this City, and that he is the owner of and has adopted a certain design as a trade-mark for the purpose of designating and distinguishing a certain liquor known as Gin, manufactured and pre-
2 pared by him for sale to the public at wholesale and retail in the City of Manila and in the Philippine Islands.

III. The said design or trade-mark consists of the following:

Two concentric circles or circumferences, the larger of which is 50 and the smaller 33 millimeters in diameter, the latter being eight millimeters distant from the former. In the upper part of the first ring formed by placing the one circle within the other the words "Ginebra de Tres Campanas" (Three Bell Gin) are written, and on the lower side of said rings the words "Patricio Ubeda," plaintiff's name. In the lower half of the central or smaller circle is a design representing three bells tied together at the top with a bow-ribbon and the ears of some cereal the ends of which hang over the two outer bells. Immediately below the said bells the words "Extra Superior" are written. Almost diametrically across the two circles a fac simile

of plaintiff's signature and rubric is stamped in black ink, the signature commencing at a point over the first three letters of the word "Ginebra" and ending near the letter "p" of the word "Campanas"; the fac-simile runs across the three bells and the end of the rubric reaching the lower part of the bell on the right and extending somewhat to the left. On the upper part of the larger circle the following words are printed in very small type: "Para evitar la falsificación nuestras etiquetas se hallan depositadas y Llevan nuestra firma." (To avoid imitation our labels are patented and bear our signature), and on the lower outer part the word "Manila."

3 IV. The bottles in which plaintiff ordinarily puts up the said liquor are square, the trade-mark being blown in the shoulder of the bottle, near one of the corners and close to the neck; but the mark thus blown in does not contain the words printed above and below the larger of the two circles, to wit: "To avoid imitations our labels are patented and bear our signature" and "Manila"; and the words "Ginebra de Tres Campanas" (Three Bells Gin) appearing on the first circle are also omitted; nor is the fac simile of plaintiff's signature and rubric blown on the bottles. Plaintiff has at times used other bottles which although of a square shape did not have the blown-in mark in question.

V. For many years plaintiff has been using the said trade-mark, affixing the same to the bottles containing the said liquor, either blown in on the bottles themselves or by means of printed labels pasted thereon, in order to designate and distinguish the said product as plaintiff's property, and as goods manufactured and prepared by him, and on account of the said trade-mark the said liquor has acquired much fame and renown, being commonly known as "Patricio Ubeda's Gin."

VI. Subsequently and for several months prior hereto plaintiff has used and affixed to the bottles containing the gin manufactured by him a seal, the upper and lower parts of which are formed by two semicircles joined by triangles those attached to the semi-

4 circles being rectangular and those joining the said triangles and which are somewhat larger than the others being obtuse angles. This design or drawing consists of a band three millimeters in width entirely surrounding the design. Plaintiff's name is printed on the upper part of the design; in the center there appears the reverse and converse sides of a medal and on the lower part the words "Primer Premio en la Esposición de Hanoi, 1902-1903," (First Prize at the Hanoi Exposition, 1902-1903). This seal, as well as the printed trade-mark described in paragraph III of this complaint is printed in gold and red.

VII. Plaintiff had the said design and trade-mark duly registered in the office of the General Director of Civil Administration under the Spanish Government and on the 24th of December, 1898, the Governor-General of the Philippines issued to him a certificate of ownership.

VIII. For several months prior hereto defendant has been and is now engaged in the manufacture of wines and liquors, including gin, which gin he sells in round or square bottles with plaintiff's de-

sign or trade-mark blown on the bottles in the same manner as those used by plaintiff, this for the purpose of defrauding plaintiff and deceiving the public by making the latter believe that the gin manufactured and sold by the said defendant is the same gin manufactured and prepared by plaintiff.

IX. Defendant besides selling his gin in bottles with plaintiff's trade-mark, also uses a printed label which greatly resembles
5 that of plaintiff, the only difference being that instead of saying "Ginebra de Tres Campanas" it says "Ginebra de dos Campanas" and in the center, instead of "Patricio Ubeda" it reads "Gabino Barretto." The rest of the label is an exact copy of plaintiff's trade-mark.

X. Moreover, since plaintiff has added to his trade-mark the seal referred to and described in paragraph VI, defendant, in order to further insure the attainment of his object, to wit, to defraud plaintiff and deceive the public, has affixed to the bottles containing the gin manufactured by him a seal which greatly resembles that used by plaintiff's in shape, the border and medal, the only difference consisting in that the medal has printed on it the name of Gabino Barretto instead of that of plaintiff and that instead of the words "Primer Premio en la Exposicion de Hanoi, 1902-1903" (First Prize at the Hanoi Exposition, 1902-1903) the words "Tarifa Inciso Tazacion a 15, Factura Num. —" appears below the medal. This seal, as well as the mark described in the preceding paragraph is printed in gold and red, the same as plaintiff's.

XI. The defendant is continually selling the gin manufactured by him in bottles of the same shape and size as those of plaintiff with the latter's trade-mark on them and other marks and labels containing the mark described in paragraph IX of this complaint, to which is attached the seal referred to in the last paragraph thereof, so that a person who is not very familiar with all the details of plaintiff's trade-mark, design and seal would not be able to distinguish
6 it and would very likely confuse the same with that used by defendant, thus inducing the public to believe that defendant's gin is the same gin manufactured and prepared by plaintiff, thereby defrauding the public as well as plaintiff, to the great prejudice of the latter.

XII. On July 31, 1905, plaintiff notified defendant that he, plaintiff, was the owner of the trade-mark described in paragraph III of the complaint and having been informed that he, the defendant, was using said trade-mark, warned him at the same time that if he continued to use said trade-mark he would resort to the courts of justice in order to enjoin him from so doing. Defendant, however, still continues to use the said trade-mark.

XIII. That defendant has sold in the manner above set forth a large amount of gin under plaintiff's trade-mark and seal in a sum not less than P50,000 of which P10,000 has been profit obtained by defendant and that, on the other hand plaintiff's sales of gin have decreased in the same amount of P50,000, he having been thus deprived of a profit of P10,000 which he would have obtained had he sold that much gin.

XIV. Unless enjoined by this Court, defendant will continue to sell his gin as above stated with plaintiff's design, trade-mark and seal and the damages which plaintiff may suffer will be irreparable.

7

XV. Plaintiff has no other proper, adequate and speedy remedy than the injunction of this Honorable Court:

Wherefore, Plaintiff prays that after due notice in the manner prescribed by law and upon trial, this court declare that defendant has infringed plaintiff's trade-mark and that defendant be required to render an accounting of the gin sold by him in bottles or flasks bearing plaintiff's trademark and seal, or either of them, and, after ascertaining the amount of such sales, in consideration of defendant's malicious and manifest purpose of defrauding plaintiff by selling his, defendant's gin, in plaintiff's bottles, using plaintiff's trademark and seal thereon, enter judgment: (1) directing that defendant pay to plaintiff double the amount of the proceeds of the gin sold by him in bottles with a trade-mark and seal similar to that of plaintiff, as an indemnity for the damages suffered by him on account of defendant's acts; (2) perpetually enjoining defendant from using in any form or manner plaintiff's trade-mark, design or seal as described in paragraphs IX and X or any other trade-mark, design or seal similar to or resembling those of plaintiff; (3) directing defendant to pay the costs. Plaintiff also prays for such other and further relief as the court may deem just and proper."

On January 25, 1906, defendant entered his appearance and on February 3 demurred to the complaint on the ground that the facts alleged therein did not constitute a cause of action, which said

8

demurrer was overruled by the court on February 20, 1906, and to the order overruling it defendant duly excepted on the 24th of the same month and year.

On March 1, 1906, defendant filed the following answer and counter-claim.

(Title of Court and Cause Omitted.)

"Now comes the defendant and in answer to the complaint states:

I.

That he denies generally and specifically each and every one of the allegations contained in each and every paragraph of the complaint, with the exception of those which he expressly admits in the following special defense.

II.

As a special defense alleges:

1. That no resemblance or similarity exists between the marks and brands used by the defendant and those of the plaintiff.

2. That ever since a time long prior to the year 1880 the device, brand or trademark "Ginebra de la Campana" of Messrs. Van Den Bergh & Co., was designed and registered in the former "Direccion General de Administracion Civil" and now called the "Bureau of

Patents, Copyrights & Trademarks," of which device, brand design or trade-mark the one described in paragraph III of the plaintiff's complaint is very like and similar, is manifestly a falsification, and is the same as was secretly inscribed in one of the books of said "Direccion General de Administracion Civil," and by its said resemblance and similarity with the said trade-mark of Messrs. Van Den Bergh & Co., causes confusion and mistakes to be made.

3. That the device used at the present time by the plaintiff and which is different from the one inscribed by him as aforesaid is equally another falsification of that of Messrs. Van Den Bergh & Co., as stated, and is used by the plaintiff with the same object of defrauding the public, just as he used formerly the falsified trade-mark inscribed in one of the books of the "Dirrección General de Administracion Civil" by taking advantage of the period during the first days of the American occupation of the City of Manila when almost all the trademarks registered were falsifications and both of said trademarks have been used by the plaintiff one after the other with the object, we repeat, of defrauding and deceiving the public in regard to the nature, origin and properties of plaintiff's said Gin confusing it with that of Messrs. Van Den Bergh & Co., and selling by this means a cheap product, at an equal price as that of Messrs. Van Den Bergh & Co.'s Gin, which is more costly from being brought from Europe. The two brands, therefore, used by the plaintiff one after the other are both falsifications of the one used by Van Den Bergh & Co.

4. That in 1900, by order of the Military Government of the United States in these Islands, the Board of Health examined and tested the plaintiff's liquors and on account of finding them injurious to the public health, from that time on he was prohibited from continuing in the manufacture of liquors, and moreover he was ordered to destroy and throw away all the liquors he had on hand, which in effect was done, and from that time he ceased manufacturing liquors and exploiting the trade-marks which he describes until 1902 when the said trade-marks of the plaintiff again appeared, being used and exploited by another party, the firm "La Rosario" of Messrs. Legarda, Tuason & Co. So the plaintiff therefore ceased exploiting said trade-marks without the just cause of "force majeure" during and for a period of more than a year and one day.

5. In the said year of 1900, the Board of Health, also by order of the said Military Government, examined and tested the defendant's liquors and finding them pure and unadulterated, the defendant was not ordered to suspend the manufacture nor to destroy said liquors but on the contrary he was permitted to continue manufacturing and selling them up to the present time, a fact which far removes from the defendant any fraudulent intention, on his part, of trying to obtain with the aid of a discredited and unauthorized trade-mark a larger sale for his liquors.

6. The plaintiff has no license from the Internal Revenue Bureau nor is he authorized to manufacture, circulate, and sell liquors of any kind, much less gin, and particularly under the brand which he

describes in his complaint, but on the contrary the distillery called "La Rosario" of Legarda, Tuason & Co., has such right, and therefore:

11 *a*. The plaintiff's business or industry is illicit and illegal and is defrauding the Internal Revenues.

b. The plaintiff has no juridical entity to file this complaint.

7. The device "Tres Campanas" used at the present time by the plaintiff was designed and printed less than a year ago while the defendant's device and trade-mark "Dos Campanas" is in circulation or use since the year 1896, with a few interruptions up to the year 1902 since which time it has been in continual use and therefore if any resemblance or similarity exists between the brand "Tres Campanas" of the plaintiff and defendant's brand "Dos Campanas" there the falsifier and counterfeiter must be the plaintiff.

8. All the destillers or manufacturers of the Philippine Islands generally use second hand bottles which are bought from Chinamen and other dealers, and the defendant in particular provides himself with bottles in this way so he is entirely unaware and ignorant of ever having used any of plaintiff's bottles, and denies having done same, and this defendant alleges that the bottles used for putting up gin are all of the same shape and size; and the plaintiff also has used and continues using bottles of the same shape and size as the ones ordinarily bought and used by the defendant.

9. Bottles used in any business or industry and especially in the manufacture of and sale of liquors are not in themselves the trade-marks but are and always have been a subject for trade-marks.

12 10. The device used by the plaintiff at the present time and the one described in his complaint were used, and this last one recently designed as already stated, *were* continued in use by the plaintiff with the object of deceiving the public in regard to the nature of the goods, and leading the public to believe that the gin of said brand has the virtue of fattening the people to an extraordinary extent after using said brand of "Patricio Ubeda" gin, when in truth and in fact plaintiff's gin has no such virtue.

11. The defendant has used the label "Dos Campanas" only during the period from April 1905 to December of the same year, having made a temporary contract for the use of the same with its proprietor, Sr. Lim Yan Sim who acquired it from Gabino Barretto who in turn was successor to Sr. Benito Mojico, and for which reason the defendant is not using and has not made use of the said brand "Dos Campanas" since the aforesaid month of December.

III.

As a counter claim the defendant alleges:—

1. That by reason of the unjustified complaint of the plaintiff, the defendant has been injured in the sum of Ten Thousand Pesos (P10,000) Philippine currency.

2. That said damages to the defendant have not been paid by the plaintiff nor any part of them.

IV.

Wherefore the defendant prays the court to render the following judgment.

A. Dismissing the complaint against the defendant.

B. Ordering the plaintiff to pay over to the defendant as damages the sum of P10,000.

C. Ordering the plaintiff to pay the cost of this suit, and

D. Granting the defendant such other remedy as may be just and equitable."

On March 6, 1906, plaintiff demurred to defendant's counterclaim on the ground that it did not show any cause of action in favor of defendant and against plaintiff, which said demurrer was sustained by the court March 10 and the counterclaim dismissed, and to the order of the court sustaining the demurrer defendant duly excepted May 13, 1906.

On March 14, 1906, defendant filed the following amended counterclaim:

"Now comes defendant and amends his counterclaim as follows:

And by way of counterclaim he alleges:

I. That the facts set out in the special defense show that plaintiff's complaint is entirely unjustified.

II. That plaintiff's object in filing his complaint was to present defendant to the public as a forger and unfair competitor, and to destroy the good fame and renown which defendant has justly attained through many years of constant labor, as a manufacturer and dealer in liquors; and also to discredit the high quality of the goods sold by defendant; and that he simply seeks the protection of the courts for the purpose of maintaining a competition of his undesirable gin with defendant's renowned product.

III. Defendant has been damaged in his fame and renown as a merchant and liquor dealer and in his liquor business to the extent of P10,000 *dollars*, Philippine currency.

IV. Plaintiff has not paid the said sum either in whole or in part."

On March 14, 1906, plaintiff moved the court to strike from the record defendant's amended counterclaim on the grounds: (1) that the same is sham; (2) because it does not show facts sufficient to constitute a counterclaim, and (3) that the amended counterclaim contains, substantially, the same allegations set out in the original counterclaim which was dismissed by the Court.

On March 15, plaintiff stated in writing that he would demur to defendant's amended counterclaim in the event that his motion to strike the amended counterclaim from the record be denied, said demurrer being based on the ground that it did not show a cause of action against plaintiff.

On March 17, 1906, the Court made the following order sustaining plaintiff's demurrer to defendant's amended counterclaim:

"This case is on for hearing upon demurrer by plaintiff to defendant's cross-complaint and it appearing to the Court that the grounds of demurrer are well taken, the same is sustained.

"The defendant's cross-complaint sets up that the defendant is entitled to damages which he has sustained on account of the plaintiff bringing this suit against him. This is unknown to the practice and in reason cannot be adopted."

March 21, defendant excepted to the order of the court sustaining the demurrer to defendant's amended counterclaim.

The case was duly tried with the assistance of assessors and on September 28, 1907, the Court rendered its decision as follows: "

16 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the City of Manila.

PATRICIO UBEDA, Plaintiff,
vs.
AGAPITO ZIALCITA, Defendant.

Decision.

The action brought in this case is an action for damages alleged to have been sustained by plaintiff on account of defendant's acts in selling gin, in round and square bottles, with plaintiff's design and trade-mark blown in the said bottle in the same manner as in those used by the plaintiff, for the purpose of defrauding plaintiff, and deceiving the public by leading it to believe that the gin manufactured and sold by defendant is the same gin manufactured by the plaintiff, and selling a large amount of gin in said bottles, as aforesaid, using a trade-mark and paper seal which greatly resemble the trade-mark and paper seal used by plaintiff to distinguish the gin manufactured by him from the other brands in the market.

The action is brought under Section 7 of Act No. 666 of the
17 Philippine Commission, approved March 6, 1903. The provisions of the said act are applicable to the case at bar, for according to the complaint and the evidence of record the acts attributed to the defendant took place in 1905. Said Section 7 of the above mentioned Act provides that any person who, in selling his goods, shall give them the general appearance of goods of another manufacturer or dealer, either in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance which would be likely to influence purchasers to believe that the goods offered are of a manufacturer or dealer other than the actual manufacturer or dealer and who clothes the goods with such appearance for the purpose of deceiving the public and defrauding another of his legitimate trade or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purpose, shall be guilty of unfair competition and liable to a civil action for damages. The same section further provides that its provisions apply in cases where the deceitful appearance of the goods, misleading as to origin or ownership, is effected not by means of technical trade-marks, em-

bleus, signs or devices but by the general appearance of the package containing the goods or by the devices or words thereon, even though such packages, devices or words are not by law capable of appropriation as trade-marks, and that, in order that the action shall lie under this section actual intention to deceive the public and defraud a competitor shall affirmatively appear on the part of the person sought to be made liable, but such intention may be inferred from similarity in the appearance of the goods as packed or offered for sale to those of the complaining party.

18 It is prayed in the complaint that this court declare that plaintiff's trade-mark has been infringed by defendant and that the latter be compelled to render an account of all sales made by him of his gin in round or square bottles, bearing plaintiff's trade-mark and seal, or either of them, and that after the amount of the said sales is duly ascertained, considering defendant's malicious purpose of defrauding plaintiff, by selling his gin in bottles with his trade-mark and seal as aforesaid, judgment be entered:

(1) Directing that defendant pay to plaintiff a sum equal to double the amount of the sales of gin made by him in bottles bearing marks and seals similar to plaintiff's, as an indemnity for the damages sustained by the latter;

(2) Enjoining defendant from the further use of plaintiff's design or trade-mark, bottles and seal and from selling the goods manufactured by him under his device or trade-mark and seal or under the trade-mark and seal described in Paragraphs 9 and 10 of the complaint, or any other devices similar to plaintiff's.

One of the allegations made by plaintiff in his complaint, after giving a description of the trade-mark of which he claims to be the owner and which he uses for the purpose of distinguishing his gin from other brands, or for selling the same to the public in this city of Manila and in the Philippine Islands, a description which entirely agrees with the trade-mark and label pasted on the bottles introduced in evidence by plaintiff's attorney (Exhibits "D" and "E") and with the first one appearing in Exhibit "F," is that the trade-mark in question was registered by him in the Office of the

19 Director-General of Civil Administration under the Spanish Government, and that a patent covering the same was issued to him by the Governor-General of the Philippine Islands December 16th, 1898.

This allegation, however, is rebutted by the context of said patent Exhibit "A," introduced by the plaintiff, for it appears therefrom that the said patent issued to plaintiff, as aforesaid, December 16, 1898, relates to a trade-mark which is not entirely similar to that described in Paragraph 3 of the complaint, the unlawful use of which is attributed to defendant, as may be seen from Exhibit "F," the bottles marked Exhibits "D" and "E" and the label pinned to the top of the said Exhibit "A," by comparing the said trade-mark with that which appears on the margin of the said Exhibit "A," which is the trade-mark referred to therein. Such a comparison will show that, although the said trade-marks have the same circular form and that around the two concentric circles the same words, to-

wit, "Patricio Ubeda" "Ginebra de Tres Campanas," "Extra Superior" are printed, and on the outside thereof the words "Para evitar la falsificación, nuestras etiquetas se hallan depositadas y llevan nuestra firma" and in the center, in gold letters, the words "Tres Campanas" and a fac-simile of the signature of Patricio Ubeda," in black ink, on the lower part of the said label, and on the outside of the larger circle of the registered mark the word "Amberes" appears, whereas the other labels contained the word "Manila," such difference having been explained during the trial, it having been alleged that the said patent was issued to plaintiff because the gin sold by him under the said trade-mark was imported into these Islands from Anvers, and not manufactured by him as stated
20 in said Paragraph 3 of the complaint. The difference between the registered mark and the other is quite noticeable, because the words and devices on the latter are not embossed, as is the case with the said registered mark, and the gold coloring is not of the same shade.

It cannot be said, therefore, that the trade-mark the unlawful use of which is attributed by plaintiff to defendant, was registered as plaintiff's trade-mark, for the patent issued to him was for the sale of gin which he was to import into these Islands from Anvers. It has also been alleged in the complaint that defendant has sold gin manufactured by him in round and square bottles bearing the plaintiff's device and trade-mark blown in the bottles, in the same manner as those used by him, with the intention of defrauding plaintiff, and deceiving the public by leading it into the belief that the gin manufactured and sold by the said defendant is the same gin as that manufactured and sold by plaintiff; but plaintiff himself, testifying as a witness, said that manufacturers of gin, as a rule, indiscriminately used bottles belonging to others; that he, too, used bottles belonging to other manufacturers; that the bottle made no difference; that he did not object to the bottle, but to the imitation of the labels; so that such an allegation cannot be taken into consideration, because plaintiff has admitted that the fact that a dealer uses bottles bearing the design and trade-mark of other manufacturers or dealers in the same liquor, blown in the said bottles, is of no importance, for he, himself, has done the same thing.

The question, therefore, reduces itself to determining, in the first place, whether there is any similarity between the trade-mark
21 or label and seal used by defendant, on the bottles of gin manufactured and sold by him, and the trade-mark or label and seal used by plaintiff on the bottles of gin manufactured and sold by him; that is to say, whether there is any resemblance between the bottles of gin as prepared and offered for sale by defendant, with the label and seal used by him, and those used by plaintiff; and, in the second place, if this be so, whether it appears beyond a doubt that defendant actually had the intention of deceiving the public or defrauding plaintiff when selling his gin in bottles with the said labels and seal. It has been proven at the trial by defendant's own testimony that he has used on the bottles of gin manufactured and sold by him, since the latter part of March, 1905,

until the month of December of the same year, the label or trade-mark and seal described by plaintiff as being similar to those used by him on the bottles of gin manufactured and sold by him as "Ginebra de Tres Campanas."

Plaintiff having admitted that the use by the defendant of the bottles with the device or trade-mark, that is to say, the words "Patricio Ubeda," blown in said bottles, cannot be made the basis of a charge of unfair competition against defendant, because he himself, the plaintiff, as described, used bottles belonging to other manufacturers, with a different trade-mark, it is not necessary to make any further mention of the bottles, particularly since all gin bottles are almost of the same shape and there is no proof that defendant had expressly selected for the sale of the gin manufactured and sold by him, with his own label and seal, bottles belonging to plaintiff or bearing plaintiff's name, the label and seal used by defendant on the bottles of gin manufactured and sold by him during the above said period being those appearing on the bottle introduced in evidence and marked Exhibit "C."

22 A careful comparison of the said label and seal with the label and seal on the bottles marked Exhibits "D" and "E", which are those of plaintiff, used by him on the bottles of gin manufactured and sold by him, and which the plaintiff claims to have been imitated by defendant, will show that the shape of the said labels and seal is identical, both having two concentric circles, the seals on the two of them being formed by two semicircles the extremities of which rest on two lines, somewhat apart, forming an angle; it will also show that around the larger circle in the respective labels the same words, to-wit, "Para evitar la falsificación nuestras etiquetas se hallan depositadas y llevan nuestras firma", "Manila" appear, and within the smaller circle the words "Extra Superior", the seals on both labels having two medals in the centre, stamped in gold.

But between the two concentric circles on plaintiff's label the words "Ginebra de Tres Campanas" and "Patricio Ubeda" appear, and in the centre of the smaller circle there are also stamped in gold three bells, tied at the top with a bow of ribbon and sheaf of some cereal, and across the two circles a facsimile of the signature and rubric, in black ink, of plaintiff; whereas the label used by defendant -as, between the two circles, the words "Ginebra de dos Campanas" "Gabino Barretto", and in the centre of the circle two bells, stamped in gold, tied at the top with a bow and the sheaf of some cereal, and across the two circles, in black, a facsimile of the signature of Gabino Barretto.

As to plaintiff's seal, on the upper part thereof and above the medals the words "Patricio Ubeda" appear, and on the lower part, under the medals, the words "Primer Premio en la Exposición de Haboi—1902 1903", which said words are right between the

23 semicircles and triangles formed by the said seal; whereas defendant's seal has on the upper part and above the medals, the words "Gabino Barretto", and below the medals the following: "Tarifa A—Inciso 1—Tasacion 5—Factura Num."

Besides, between the seal and the label on plaintiff's bottles, there

is a small slip of paper, with the words and figures "A-1-2", which do not appear on the seal and tickets on defendant's bottles. Plaintiff has also used on his bottles, as he himself has stated and as appears from Exhibit "D" certain lead caps covering the cork, on the upper part of which the words "Patricio Ubeda" appear, and on the bottle marked Exhibit "E", and hanging from the neck thereof, a metal ring with what appears to be a silk tassel, so as to distinguish his bottles from the other gin bottles in the market, as he claims; whereas, although the bottle marked Exhibit "C", introduced by defendant, also has lead cap, there is printed upon the same a vine-leaf, without any words. Another noticeable difference between the label and seal used by plaintiff and the label and seal used by defendant is that the devices and words on the former are embossed, whereas the devices and inscriptions on the latter are not, and on the labels of the former the outer edge of the larger circle is serrated, which is not the case with the circles on defendant's labels, the edges of which are plain.

It will be seen, by the foregoing description and comparison, that, although there is some similarity between the label and seal used by the plaintiff and the label and seal used by defendant as a trade-mark or design for the gin manufactured & sold by them respectively, in the shape and coloring of the said labels and seal—al-
24 though the coloring on defendant's labels and seals is heavier than that on defendant's,—it cannot be said that there exists a resemblance between the labels of gin as prepared and presented to the public by plaintiff and those offered for sale by defendant, not even in the general aspect of the bottles, because the number of details which distinguish one label from the other, and one seal from the other, are so many that a person can tell at a glance which is "Patricio Ubeda" gin and which is "Gabino Barretto"—that is to say, the gin manufactured by defendant, particularly in view of the fact that plaintiff testified that he not only adopted the use of the seal on his gin bottles to distinguish them from the gin bottles of defendant or other dealers in the market, but that in addition thereto he also adopted the lead cap and the little ring and tassel.

Moreover, no testimony has been introduced by the plaintiff to show that any person, in attempting to buy gin with the trade-mark "Tres Campanas", that is to say, gin manufactured by "Patricio Ubeda", had confused same with the gin bearing the mark "Dos Campanas", that is to say the gin sold by "Gabino Barretto". On the contrary, all of the witnesses for the plaintiff who testified that they knew the two brands of gin, to-wit, "Tres Campanas" and "Dos Campanas", with the exception of Antonio Pueo—who said that he knew only the first-named brand, to-wit, that of "Patricio Ubeda"—have shown that they were able to distinguish and appreciate the difference between the two brands of gin; and according to the testimony of some of the said witnesses the three brands "Uno Campana", "Cuatro Campanas" and "Cinco Campanas" were also known in the local market, one of the said witnesses being Carlos Palanca, the manufacturer of the gin known as "Cuatro Campanas."
25 So that, in view of these facts, it is not possible to say with any degree of certainty, and beyond any doubt, that the

public in general, not the professional drinkers, was unable to distinguish the various brands of gin, that is to say, "Dos Campanas" from "Tres Campanas" brand. There were various brands of gin of a different number of "Campanas" (Bells). If there had been only two brands of gin, that is to say, "Dos Campanas" and "Tres Campanas", it might have been easy to mistake one for the other, and it also might be said that the manufacturer and dealer in one of these brands had attempted to imitate the other brand, or to offer the goods for sale in bottles which would lead the public to believe that his gin was the same gin made by the other manufacturer using a similar label.

The very fact that there existed, or was offered for sale, gin in bottles bearing different marks, with different numbers of "Campanas" (Bells), from one to five, will convince us that the public could tell the difference between the various brands rather than confuse these two particular brands of "Dos Campanas" and "Tres Campanas."

Counsel for plaintiff introduced a witness by the name of Miguel Morales, in order to prove that this witness had bought a case of gin, of the "Gabino Barretto" brand, in a store on Calle Fundador, of the same quality as that marked Exhibit "C", and that the vendor acted rather suspiciously when he sold him the gin, which he did only after convincing himself that Morales was not going to re-sell the case of gin that he had bought.

Upon examination, however, of this witness's testimony, it will be noticed, in the first place, that at the beginning of his statement, and upon being asked by counsel for plaintiff whether he was familiar with the trade-mark under which Mr. Ubeda sold his gin, he said that he was, and that, having been asked by same counsel whether he knew the trademark used by defendant, with the name of "Gabino Barretto", he said that he did not, although subsequently, when the bottle, Exhibit "C", was shown to him, with the trade-mark of "Gabino Barretto," he said that he knew this latter brand, and admitted that he had bought gin with the same trade-mark in the month of September,—the 15th of September, 1906, from a liquor distillery on Calle Fundador, to the amount of fifteen bottles, in a case.

26

In the second place, this same witness, upon questions propounded by counsel for defendant, said that he had purposely looked for the "Dos Campanas" brand, but that he had no preference for this particular brand of gin and asked the Chinaman whether he had any of the "Tres Campanas" brand; that the Chinaman told him that he had none in stock; and that, noticing some bottles of the "Dos Campanas" gin in the store, he asked the Chinaman whether that gin was for sale, and he told him that it was, whereupon the witness said to him: "Well, let me have some of that." The witness further testified that he bought the gin knowing that it was not of the "Tres Campanas" but of the "Dos Campanas" brand.

In the third place, this same witness said that the Chinaman who was the owner of the distillery or store asked him whether he expected to sell the case of gin, and that he, the witness, told him that

he did not, as he expected to ship the same to Pangasinan province, to an uncle of his, with whom he contemplated spending a two months' vacation,—adding that he did tell the Chinaman that he intended to send the gin to the provinces, or to his uncle's house in Pangasinan, because the Chinaman seemed somewhat unwilling to let him have the gin. But this witness, before making this statement referring to the two months of vacation that he wished to spend at the house of his uncle in the Province of Pangasinan, said: "It so happened that I was taken sick, and was therefore unable to take my vacation."

27

As it will be seen, this witness stated that he knew the brand "Gabino Barretto" only when the bottle marked Exhibit "C" was shown to him, that is, the bottle with the "Dos Campanas" trademark, whereas he not only stated positively that he had bought at the store in Calle Fundador a case of gin of this brand but that he had purposely looked for that particular brand of gin on that occasion, and which he finally bought because the Chinaman did not have the other brand, "Tres Campanas."—statements which are almost irreconcilable.

This same witness, in an attempt to show that the Chinese owner of the distillery was unwilling to sell him the case of gin in question, stated that he had invented this story about sending the gin to the provinces, to his uncle's house in Pangasinan province, in order to give the Chinaman to understand that he was not going to re-sell the gin; but it will be remembered that he also said that it so happened that he was taken sick and was therefore unable to take his two months' vacation in his uncle's house in Pangasinan. It would appear, therefore, that this was not, as he pretended, a means employed by him to induce the Chinaman to sell him the case of gin, for his own testimony will show that his real intention was to go to the provinces, to his uncle's house, and spend his vacation with him. If there is no truth in what the witness said about the ingenious means employed by him, it would seem that it must be equally untrue that the Chinaman showed any unwillingness to sell him the case of gin, as he claims. In view of all this, it would seem that this witness is unworthy of credit; nor can he be believed on account of his having recognized, as invoice or receipt for the said case of gin which he claims he bought from the Chinaman on Calle Fundador, Exhibit "J," for the reason that this receipt does not clearly show that the case of gin sold to him was of the "Dos Campanas" brand or of the "Gabino Barretto" brand. The receipt reads as follows: "For a case of gin of '2 cop.'" This abbreviation, with the figure preceding it, does not necessarily mean "Dos Campanas," for it may also be taken to mean "dos copas" (two glasses). It is true that the official invoice, Exhibit "K," shows that the distillery where the witness Miguel Morales bought the gin from the Chinaman, in order to send the same to the Province of Pangasinan, on the 15th of September, 1906, was duly registered in the Bureau of Internal Revenue, in accordance with Tariff A; Section 1, Assessment No. 560,—these being the same words and figures appearing on Exhibit "ñ," introduced by plaintiff, which said Ex-

28

hibit contains the trade-mark "La Fuerza." Plaintiff himself testified that, subsequent to the filing of the complaint, the defendant used this trade-mark "La Fuerza" on the gin sold by him; but this statement, and the fact that the case of gin bought by Morales was bought by him from a distillery duly registered in the Bureau of Internal Revenue, under the tariff, section and assessment appearing on the trade-mark "La Fuerza," do not show that this gin was not "Dos Campanas," that is to say, the brand owned by "Gabino Barretto," for it has not been shown during the trial that there was any relation between the said trade-mark and the other trade-mark "La Fuerza," nor has it been shown that defendant was the owner
29 of the distillery or of the trade-mark "La Fuerza," or that he sold the gin manufactured by him under the said trade-mark.

It has also been alleged by plaintiff in his complaint that he notified defendant on July 31, 1905, that he, plaintiff, was the owner of the trade-mark described in Paragraph 3 of the said complaint, that is, the trade-mark shown on the bottles Exhibits "D" and "E," warning him at the same time that he would bring judicial proceedings against him, should he, defendant, continue to use his said trade-mark,—notwithstanding which, the defendant continued to do so.

It was proven at the trial by letter marked Exhibit "B," and by the testimony of the defendant himself, that he, the defendant, answered on the following day, August 1st, informing the plaintiff that he, defendant, had bought the gin trade-mark known as "Dos Campanas" in the belief that in so doing he was not injuring anyone, but that in view of plaintiff's claim he had no objection to losing the purchase-price of the said trade-mark provided the plaintiff would be kind enough to convince him, the defendant, that the former's trade-mark was duly registered,—adding that he had sold so little of the gin "Tres Campanas," due undoubtedly to the fact that the former owner of the distillery had produced so inferior a grade of gin, that he, defendant, would deem it a favor if he could only exchange his brand for another.

As has already been said, the trade-mark referred to by plaintiff in his notice to defendant of the 31st of July, 1905, and the trade-mark referred to by defendant in his letter of August 1st,—the said trade-mark being the same as that on the bottles marked Exhibits "D" and "E,"—was not then and is not now registered as the
30 property of the plaintiff, because the patent issued by the Director General of Civil Administration to the plaintiff, on September 16, 1898, Exhibit "A," does not relate to that trade-mark, but to another which is very similar. Further, the object of that patent was to authorize plaintiff to import into this market wine under the trade-mark known as "Tres Campanas," which said wine plaintiff claims he imported from Anvers, the difference between the trade-mark on the bottles Exhibits "D" and "E" and plaintiff's trade-mark being that the former has, below the second circle, the word "Manila" whereas the trade-mark referred to in Exhibit "A" has the word "Amberes."

It has also been proven that defendant was not the original owner of the trade-mark "Dos Campanas—Gabino Barretto," but that he

bought the same from the Chinaman Limiao Lim, who bought it from the said Gabino Barretto, and that the defendant had not used the said trade-mark from December, 1905, when he returned the same to the Chinaman from whom he had bought it, because, as the defendant says, he realized that the said trade-mark might be considered illegal.

It appeared, therefore, not only that the plaintiff based his action upon a false assumption when he notified defendant that the trade-mark "Tres Campanas," as shown on the bottles marked Exhibits "D" and "E," was registered, but that defendant never concealed the fact that he had been using the trade-mark "Dos Campanas,"—defendant insisting that he thought he had a right to continue to use the said trade-mark until plaintiff show to him that he had his, plaintiff's, trade-mark duly registered, in which case he would agree to cease using the said trade-mark and lose the purchase-price
31 of the same. This—taken into consideration with the fact that plaintiff himself admitted that defendant, after the receipt of his notice, had shown a disposition to submit his books, for inspection, to Benito Legarda, plaintiff's partner, with a view to a settlement of the matter,—shows good faith on the part of the defendant; and for this reason it cannot be inferred, from the mere fact that the bottles of gin sold by him were similar to those of plaintiff, that his actual intention was to use the said label and seal, that is to say, the trade-mark "Dos Campanas," for the purpose of deceiving the public and defrauding the said plaintiff.

On the other hand, it appeared from the testimony of Manuel Iriarte, Chief of the Bureau of Archives, that there was no record, in his office, of the patent Exhibit "A," which relates to the trade-mark "Tres Campanas," which said patent purports to have been issued by the Director General of Civil Administration on December 16, 1898, in favor of plaintiff as a wine-importer, but simply a memorandum, to the effect that the said patent had been issued, by his Excellency the Governor-General, on the said date, to the plaintiff as an importer of the wine known as "Tres Campanas,"—a certified copy of which memorandum was introduced in evidence at the trial and marked Exhibit "12."

Further, the sheets of "Papel Reintegro" (official paper) covering the fees for the said trade-mark, are not signed and do not bear the seal of the respective office, that is to say, of the Office of the Director-General of Civil Administration, by which it is said the patent was issued. On the other hand, it would appear from
32 the certified copy marked Exhibit "8" that on December 11, 1873, there was issued by the Minister of the Interior, of Spain, a certificate in favor of Messrs. Van Den Bergh & Company, liquor manufacturers at Anvers, for the use of the trade-mark "Ginebra de la Campana" (Bell Gin), Van Den Bergh & Co., which said certificate authorized them to use this trade-mark in the Spanish Peninsula and its outlying territories. This trade-mark appears in the record as Exhibit "3." It greatly resembles that marked Exhibit "A," the patent for which, according to the said Exhibit "A," was issued to the plaintiff herein by the said Director-General of Civil

Administration,—the only difference between the two marks being that plaintiff's has in the centre of the two circles three bells, with a fac simile of the signature of "Patricio Ubedo" stamped across the two circles, in black ink, whereas the trade-mark represented by Exhibit "3" has in the center of the circle only one bell and a fac simile of the signature of Van Den Bergh & Co. across the two circles,—under which said trade-mark have existed, and now exist, in this market, for sale, gin bottles, as has been shown at the trial. This trade-mark was registered in the Bureau of Archives, November, 1903, there being no record in the said Bureau of Archives of the trade-mark "Tres Campanas," while the trade-mark of Messrs. Van Den Bergh & Co. is now registered in the United States of America.

The similarity between the trade-mark "Ginebra de la Campana—Van Den Bergh & Co." and the trade-mark "Ginebra de Tres Campanas—Patrico Ubeda," and the circumstances referred to relating to the registration and issuance of the patent in favor of plaintiff, for the latter of the said trade-marks, should be taken into con-
33 ideration, for the purpose of weighing the acts of the parties and determining their respective rights. All this throws some light upon the conduct of the defendant in continuing to use the trade-mark "Dos Campanas," even after he had received plaintiff's notice and making the investigation to which he refers in his testimony as to the registration of plaintiff's trade-mark, in ceasing to use it for several months thereafter, fearing that the use of the said trade-mark "Dos Campanas" might be considered illegal, wherefore he returned the said trade-mark to the person from whom he bought it. The foregoing also shows that the various trade-marks, with a greater or less number of bells, used in this market on gin-bottles, were simply an imitation of the trade-mark "Ginebra de la Campana—Van Den Bergh & Co." which they resemble very much. If we were to judge only by the similarity between the two trade-marks, it would seem that plaintiff has no right to accuse the defendant of unfair competition on account of his having used the trade-mark "Dos Campanas."

Finally, it appears from Exhibit "L" that plaintiff had been given a share, in a separate account, with the firm of Tuason, Legarda & Co.," under the heading of "Wines and Liquors," which goods were to be sold with labels bearing plaintiff's name, so as to distinguish them from the other liquors manufactured by the factory "La Rosario," in which said factory the plaintiff was at the same time employed as a maker of wines and liquors.

Plaintiff, although a partner in the business, or in that particular business only, and although the labels, used on the bottles of gin manufactured by the distillery La Rosario, bear his name,
34 under his agreement with the firm, and although for this reason he might consider himself the owner of the said label bearing the trade-mark "Ginebra de Tres Campanas," he had no legal capacity to exercise any action with reference to the said trade-mark or label. The person who had such right was the manager of the firm of Tuason, Legarda & Co., in the business of which he had a share, that is to say, in the business of manufacturing liquors and

wines; for it is well known that, in the case of a partnership like this the manager is the person who should represent the firm in any litigation; and in the case of an "account in participation" the firm giving such interest or participation is the only one that has a legal capacity to represent the firm in all matters affecting the partnership or any of the persons having a share in the same or in any business conducted by the same.

Wherefore, plaintiff has no cause of action against the defendant in this case, and therefore is not entitled to the damages which he seeks to recover in his complaint, for there is no basis of any kind for such a claim.

The court does therefore hereby acquit the defendant, Agapito Zialcita, of the complaint filed against him in this action by the plaintiff, Patricio Ubeda, who is hereby directed to pay the costs.

It is so ordered.

(Signed) MANUEL ARAULLO.

35 On September 28, 1907, plaintiff excepted to the judgment of the court and moved for a new trial on the ground that the said judgment was openly and manifestly contrary to the weight of evidence, and contrary to law, which said motion was overruled by the court October 5th, and to the order overruling the same plaintiff duly excepted and announced his intention to prosecute a bill of exceptions to the Supreme Court of the Islands to review the said judgment, and all orders and decrees made herein.

"Wherefore, plaintiff now presents to this court the foregoing bill of exceptions and prays that the same be approved and certified by the court and duly forwarded by the Clerk to the Supreme Court, with all the testimony and documentary evidence introduced at the trial and which are hereby expressly made a part of this bill of exceptions."

(Signed) "KINCAID & HURD,
"*Attorneys for Plaintiff.*"

Received copy October 14, 1907.

B. GUZMAN,
In the Absence of Counsel for Defendant.

(Title of Court and Cause.)

"Upon consideration of the foregoing bill of exceptions pre-
36 sented by counsel for plaintiff, the same is hereby approved and certified and it is ordered that it be forwarded to the Supreme Court of these Islands, with all the documentary and oral evidence introduced at the trial."

"Manila, October 22, 1907.

(Signed) "MANUEL ARAULLO, *Judge.*"

Certificate.

"I, J. McMicking, Clerk of the Court of First Instance of the City of Manila, do hereby certify that the foregoing bill of exceptions,

consisting of 37 typewritten pages, is the original bill of exceptions presented by the appellant and approved by the court.

"In witness whereof, I sign these presents in Manila this — day of November, 1907."

(Signed) "J. McMICKING, *Clerk*."

"MANILA, *October* 23, 1907.

"Mr. W. A. Kincaid, Ramon Diokno.

"GENTLEMEN: I have the honor to inform you that the bill of exceptions in Civil Case No. 4233 has been approved by the court.

"The said bill of exceptions will be retained in my office
37 for the period of two days from this date in order that you may examine the same and see whether all the documents, papers, and testimony, etc., which by the said bill of exceptions are made a part thereof, are attached thereto.

"At the expiration of the said period of two days, the bill of exceptions will be duly forwarded to the Supreme Court as complete."

"Respectfully,

(Signed) "J. McMICKING, *Clerk*."

"Copy of the above letter has this day been sent to the parties.

"Manila, October 23, 1907."

(Signed) "J. McMICKING, *Clerk*."

Indorsed: "Supreme Court of the Philippines, Clerk's office. Filed November 6, 1907. (Sgd.) R. Heras, Acting Clerk."

38 RECORD OF THE TRIAL.

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the City of Manila, Part III.

No. 4233.

PATRICIO UBEDA, Plaintiff,
versus
AGAPITO ZIALCITA, Defendant.

Before the Honorable Manuel Araullo.

MANILA, *December* 14, 1906.

Present:

W. A. Kincaid, Counsel for Plaintiff.
Ramon Diokno, Counsel for Defendant.

Mr. KINCAID: First of all I desire to introduce in evidence the title of ownership of the trademark in question.

The COURT: The title of ownership of the trademark in ques-

tion is admitted in evidence, and in order that the copy of the same appearing on the first page may not become detached, the same has just been pasted onto the other papers—only to prevent its loss.

39 Mr. DIOKNO: I object to the admission of the said document in evidence for the reason that it has not, in the first place, been properly identified, and secondly, because under Section 28 of the Royal Decree in question, dated August 21, 1884, this title or patent has lapsed or become void, for the reason that—well, it is better to read the section in full. It has lapsed. I will read the section.

The COURT: It has lapsed but the "papel de reintegro" due thereon was paid.

Mr. KINCAID: I ask the court that the document be marked Exhibit "A" and that the "papel de reintegro" be considered as an integral part of the same.

Mr. DIOKNO: I insist on my previous objection.

The COURT: The document is admitted in evidence for the reason that the "papel de reintegro" has been produced. Further, this is a public instrument which bears the seal of the office of the Director-General of the Civil Administration. Let the "papel de reintegro" be attached to the title itself.

Mr. DIOKNO: Exception.

Mr. KINCAID: I also offered this document in evidence as a part of the said title, I mean the "papel de reintegro."

Mr. DIOKNO: The same objection.

The COURT: Objection overruled. The document in question is admitted in evidence as an integral part of the previous one. All of them together should constitute one single document and be marked Exhibit "A."

40 Mr. DIOKNO: With my exception. I wish to call the attention of the court to the fact that those papers refer to a trademark secured by plaintiff as an importer, as the patent itself recites.

Mr. KINCAID: I offer in evidence a letter addressed by defendant to plaintiff, dated August 1, 1905, wherein he admits that he has no right whatsoever to the trademark in question.

Mr. DIOKNO: That is a private document.

Mr. KINCAID: I will identify this letter by the defendant himself.

Testimony of Agapito Zialcita.

Having been duly sworn, in accordance with law, testified as follows:

Q. What is your name?
A. Agapito Zialcita.
Q. Occupation?
A. Manufacturer.
Q. Residence?
A. Manila. The signature is mine and the letter was written by me.

The COURT: Admitted.

Mr. DIOKNO: We reserve our right to cross-examine the witness.

Mr. Kincaid then asked attorney Diokno whether he had any objection in admitting that the trademark and seal on the bottle was his, Mr. Diokno's, client's.

Mr. DIOKNO: No sir.

41 Mr. KINCAID: I now offer in evidence a gin bottle with the trademark used by the defendant and seal used by him, and ask that the same be marked Exhibit "C."

The COURT: Admitted.

Mr. DIOKNO: There is no objection whatever in so far as the trademark and paper seal pasted on the bottle is concerned.

Testimony of Carlos Palanca.

Having been duly sworn, testified as follows:

Questions by Mr. KINCAID:

Q. What is your name?
A. Carlos Palanca.
Q. Where do you live?
A. 210 San Jacinto.
Q. What is your occupation?
A. Merchant.
Q. In this case, wherein Patricio Ubeda is plaintiff and Agapito Zialcita is defendant, relating to trademarks on gin and wines, do you know the parties?
A. I know both parties.
Q. Do you know Gabino Barreto?
A. I do not know him personally.
Q. But you know the plaintiff and the defendant, do you not?
A. Yes sir.

Q. How long have you known the plaintiff?

42 A. I have known the plaintiff for a long time, to be sure for about five or six years.

Q. Do you know the business in which he has been engaged during all that time?
A. I learned that Mr. Ubeda has a gin factory, a liquor distillery.
Q. Do you know the trademark used by him in his distillery?
A. Yes sir. I do.
Q. Could you identify a bottle of the gin sold by him with the trademark and seal, if it were presented to you?
A. I think I could.
Q. I will now show you this bottle of wine with the trade-mark and seal appearing thereon and will ask you whether you recognize the same and whose product it is.
A. Yes. I have known this for a long time. This is Mr. Ubeda's.

Mr. KINCAID: I now offer this bottle in evidence, together with the trademark and seal thereon, and ask that the same be marked Exhibit "D."

Q. Do you know how long he has been using this trademark in the Philippines?

A. No, I do not know how long.

Q. How long do you know that he has been using this trademark on the liquors put up by him?

A. I have seen that trademark before the Internal Revenue Law went into effect but it did not then have this paper below.

43 Q. With this seal?

A. Yes.

Q. But what about the trademark?

A. Yes.

Q. Well, who used this trademark?

A. Mr. Ubeda, whose name always appeared on it.

Q. Do you know whether he used it continuously up to the present time?

A. As far as I can see from the advertisements he has continuously used it but I do not know whether he has so used it himself personally.

Q. I will show you Exhibit "C," which is a gin bottle with the trademark used by the defendant and will ask you whether you know this mark and seal.

A. Yes. I know it too. I have seen it occasionally.

Q. When did you see this trademark for the first time?

A. I do not remember whether it was in 1903 or 1904; I cannot say exactly, but it seems to me that it was only two years ago that I first saw it.

Q. Who was using it before that you know?

A. It was first used by certain Chinese on Calle Espeleta, who had a distillery there.

Q. Do you know who those Chinese were?

A. I do not. I have been told that one of them is Gabino Barreto.

Q. How long have you lived in Manila?

A. Twenty or twenty-one years.

44 Q. What has been your occupation during all that time?

A. I have engaged in various kinds of business. At first I was a drygoods merchant and later a manufacturer and at present I am in charge of a distillery similar to this.

Q. You mean a liquor distillery?

A. Yes sir.

Q. What is it? Gin?

A. Yes sir.

Q. For how many years have you had that distillery?

A. For about five years.

Q. When you first saw this Exhibit "C" bearing Gabino Barreto's trademark, did you already have that liquor distillery?

A. Yes sir.

Q. How long had you been conducting that distillery when you first saw the trademark of Gabino Barreto?

A. I cannot say exactly whether it was in 1902 or 1903. I know, however, that that distillery when the Internal Revenue Law went into effect was closed.

Q. You mean to say that Gabino Barreto's distillery was closed?
A. Yes sir.
Q. Did his trademark disappear from the market?
A. The owner of the distillery himself told me that it had been closed.

Mr. DIOKNO: I ask that so much of the witness's answer as is hearsay be stricken out.
The COURT: Motion sustained.

Q. When did you again see Gabino Barreto's trademark?
45 A. Last year.
Q. Who was using it at that time?
A. I do not know.
Q. How do you know it?
A. I have seen it in all the stores where they sell liquors.
Q. Do you know whether the trademark used by Patricio Ubeda ever ceased to be so used since you first saw it?
A. I do not know, I do not know about that.

Cross-examination by COUNSEL FOR DEFENDANT:

Mr. KINCAID: I have offered this bottle in evidence.
Mr. DIOKNO: To the witness:
Q. Have you ever seen gin bottles in the market bearing the trademark "Tres Campanas"?
A. Yes sir.
Q. Is this the shape in which the bottles are put on the market?
A. Yes sir, and sometimes they leave this blank.
Q. Please note the external appearance of this trademark Three Bells Gin and state whether this is the same that has been used heretofore.
A. I cannot say that exactly. All that I can say is that they are the same Three Bells.
Q. Then you have not particularly noticed the trademark which was formerly used and for that reason you are now unable to say whether this is exactly the same trademark? Is that it?
A. They appear to be the same.
46 Q. They only seem to be but they are not, are they?
A. All the same Three Bells.
Q. All you remember is, as a matter of fact, that this trademark and the other trademark are the same because both bear a design of Three Bells, but you have not particularly noticed the rest of the design, have you?
A. Yes. Three Bells.
Q. This bottle is put on the market bearing a label with a serrated edge around here and with a certain trademark to distinguish it from others, is it not?
A. I have not noticed it particularly.
Q. Moreover, this bottle is put on the market with a band around it containing the statement that any other brands not bearing the word "Campana" are imitations.

A. Sometimes they have a piece of paper pasted back here.
Q. With that statement?
A. I do not know anything about the notice, but I have seen a long piece of paper.
Q. And how did you come to know that the trademark "Tres Campanas" is that of Mr. Ubeda?
A. Because it comes from the same distillery and people always know who owns the trademark.
Q. You know that the trademark "Tres Campanas" in question belongs to Patricio Ubeda by hear-say only, do you not?
A. Yes sir.

47 *Q.* I object to the admission of this bottle in evidence for the reason that the witness has not positively identified this mark as the trademark of Mr. Ubeda.
Mr. KINCAID: We have produced the registered trademark itself.

Q. What kind of marks do you use in your distillery?

Mr. KINCAID: I object to the question.
Q. I intend to prove that the witness has used other trademarks with the representation of a bell. Later on I will prove the similarity between the two trademarks. That is what I desire to establish.
Mr. KINCAID: I object to the admission of the evidence offered by counsel for the other side, as incompetent.
The COURT: Objection overruled.
Mr. KINCAID: With my exception.

A. The gin now on the market bears on the trademark a representation of a jockey on horseback.
Mr. KINCAID: And formerly?
A. Formerly it was the representation of a jockey and an eagle.
Q. You have never used the trademark with the bell?
A. I have used Four Bells but they are quite different from that.
Q. But was that mark to which you refer of the same size as this?
A. I think it was larger.
Q. Was it round?
48 A. Yes, round.
Q. How does it differ from this trademark?
A. That was Four Bells and this is Three.
Q. Does the mark used by you bear these words?
A. And those words?
Q. I mean these words "To avoid imitations, etc." (Counsel reads from the label on the bottle.)
A. No, because we used Four Bells.
Q. When did you use that mark with Four Bells?
A. Last year, I do not remember exactly. I have not used it for a long time.
Q. How long ago did plaintiff cease using that tassel on the neck of the bottle and that label?

Mr. KINCAID: I object to the question, as incompetent. I will

withdraw my objection. I object, however, to the question for the reason that the witness has not said that any tassel was used.

A. I said that the bottles had a piece of paper pasted on the back, but I have said nothing about a tassel.

Q. When did the plaintiff cease using that label?

A. I do not know.

Q. About how long ago?

A. I have seen some bottles bearing that label but sometimes they do not have it; I do not know whether they have ceased using that label or not.

The COURT: The bottle is admited in evidence and marked
49 Exhibit "D."

Q. I call the attention of the court to the fact that the trademark on the bottle is different from the others; on the upper part of the same the word "Manila" appears, while on the registered trademark the word "Amberes" is printed.

The COURT: That is no reason why at the outset we should reject the bottle introduced in evidence, in view of what the witness has just said to the effect that the mark in question is used by the plaintiff's distillery. The people sometimes can tell from the trademark what manufacturer or distillery uses it.

Q. With my exception.

Testimony of Antonio Pueo.

Having been first duly sworn, testified as follows:

Mr. KINCAID: What is your name?

A. Antonio Pueo.

Q. Where do you live?

A. 122 Arzobispo.

Q. Occupation?

A. Merchant.

Q. There is a controversy here between Patricio Ubeda and Mr. Zialcita. Mr. Ubeda is plaintiff and Mr. Zialcita is defendant. Do you know the parties?

A. Yes sir.

Q. How long have you known Patricia Ubeda?

50 A. I have known him for about eight or nine years.

Q. Where was he living during all that time?

A. I have known him at two or three different places—on Calle Anda and later on on Calle San Sebastian.

Q. Then he lived in Manila during all that time, did he not?

A. The first time I knew him, yes.

Q. In what business was he engaged at the time?

A. In the manufacture of all kinds of liquors and gin.

Q. Do you know whether he has been using that trademark?

A. I have known several trademarks of his, one of them, the most popular, was that of his gin.

Q. I will show you Exhibit "D." a gin bottle, and will ask you whether you know this trademark.

A. Yes sir, I know it.

Q. Who owns it?

A. According to the label, Patricio Ubeda.

Q. Is that the same trademark that you have always seen on his gin bottles during all those years?

A. Yes sir, black and white (bottles?). I have bought hundred of bottles from him.

Q. Black and white, what do you mean by that?

A. I mean the Bell brand in black and white.

Q. But the trademark was always the same, was it not?

A. Yes, I have never known any other trademark on his gin except that one.

51 Q. What has been your occupation during those six or eight years you have been acquainted with Mr. Ubeda?

A. My occupation has been buying and selling in my line of business.

Q. What is your business?

A. I deal in all kinds of liquors, foodstuffs and groceries.

Q. Do you know whether this trademark of Mr. Ubeda has been used by him much and continuously during all that time?

A. If I remember correctly, I have been buying gin from him for the last five or six years.

Q. In large amounts?

A. Thousands of cases.

Q. Have you seen it in different places?

A. At least I have sent a considerable amount of it to the provinces and have seen myself here in Manila on the market.

Q. You have also seen the article in the stores of different merchants, have you not?

A. Yes sir, in their stores.

Q. Do you know this other trademark, which appears on Exhibit "C"?

A. This is the first time that I have seen this trademark in Manila.

Q. That is all.

Cross-examination by Counsel for Defendant:

Mr. Diokno: Has Mr. Ubeda always put up his gin for sale
52 here in the market in the same form as we find it now in this bottle?

A. I cannot say about that but I think he has.

Q. And with reference to the trademark, you do remember that it is the same because it bears the representation of Three Bells, is that right?

A. Yes, Three Bells and the name of Patricio Ubeda too.

Q. You have not paid any particular attention to the minor details of the trademark, have you?

A. No, I certainly have not.

Mr. Diokno: That is all.

Testimony of Arnold Hollman Queju Pae.

Having been first duly sworn, testified as follows:

Mr. KINCAID: State your name, occupation and residence.
A. Arnold Hollman Queju Pae.
Q. Occupation?
A. Storekeeper.
Q. Residence?
A. 256 Santo Cristo.
Q. What is your business?
A. I keep a liquor store.
Q. Do you keep gin?
A. Yes sir.
Q. How long have you been in that business?
A. For more than five years.
53 Q. Do you know Patricio Ubeda?
A. I know the label bearing the representation of Three Bells.
Q. How long have you known that label?
A. I cannot remember.
Q. Approximately?
A. Four or five years.
Q. I will show you Exhibit "D," introduced in evidence by plaintiff, and will ask you whether this is the label to which you refer (showing to the witness Exhibit "D")?
A. Yes, because this label belongs to Patricio Ubeda, he being the owner of the Three Bells brand.
Q. Did you keep any of that gin in your store with that trademark on it?
A. Yes, we sell that brand.
Q. Whom do you buy it from?
A. From Don Patricio.
Q. Do you know whether this trademark is a well known brand in the market?
A. That I do not know.
Q. Have you seen large amounts of gin with that label on it?
A. No, I do not know.
Q. Where have you seen that trademark?
A. Because the Three Bell brand gin we buy has the name of Patricio Ubeda printed on the label.
Q. You have dealt in that gin?
54 A. Yes sir.
Q. How long ago?
A. Four or five years ago.
Q. Always bought it from Patricio Ubeda?
A. Yes sir.
Q. Do you know any other brand similar to that of Don Patricio?

Mr. DIOKNO: I object to the question for the reason that counsel assumes from the outset the similarity of the two brands.

Mr. KINCAID: I do not refer to the trademark.

The COURT: Objection overruled. There is no other way in which the question can be put.

Mr. DIOKNO: Exception.

Mr. KINCAID: Addressing the witness:

Q. Do you know any other brand?

The COURT: No. Ask him whether he knows any other brand of gin.

Q. Do you know any other brand of gin put up by Gabino Barreto?

A. Yes, the Two Bell brand, but we do not buy that brand. I know, however, that such a brand exists.

Q. I will show you plaintiff's Exhibit "C" and will ask you whether this is the brand sold by Gabino Barreto to which you refer.

A. My understanding is that he sells gin, but we do not buy his brand.

Q. But you have seen it, have you not?

55 A. I have been told by others that the gin is put up by Gabino Barreto.

Q. But what I asked you is whether or not you have seen gin put up in bottles with that trademark on it.

A. But in a great many stores they do not sell that brand.

Q. But what I asked you is whether or not you have seen it anywhere.

A. No, no, no, no, I have not seen it; no, I have not seen it.

Q. When did you first hear about this brand sold by Gabino Barreto?

A. This was some two or three years ago.

Cross-examination by COUNSEL FOR DEFENDANT:

Mr. DIOKNO: I will show you plaintiff's Exhibit "D"; also this other bottle here which has not as yet been introduced in evidence in this cause, the bottle with the tassel on it, and will ask you to state which of the two bottles are sold on the market.

Mr. KINCAID: I object to the question.

Mr. DIOKNO: I withdraw the question.—addressing the witness—

Q. Do you know this other bottle which I show you now?

A. Yes sir.

Q. Whose trademark is this?

A. Patricio Ubeda's.

Q. Well, which of these two bottles is sold in the market?

56 A. The one with the tassel on it.

Q. Do you mean to say that Exhibit "B" is not the same as the gin bottles now sold in the market?

A. Yes, they are also sold in the market. We also consume some of that.

Q. How long have they been selling gin without that tassel and without that label?

A. This brand here, to be sure, for the last three years.

The COURT: Which?

A. The one without the tassel. Exhibit "D." For the last four years.

Q. The one without the tassel, how long did you say?

A. I cannot remember. Sometimes we buy one case and sometimes three.

Q. But the one that has been sold in the market since last year has this tassel on it, has it not?

A. Yes, sir.

Q. What brands of gin do you sell in your store?

A. I sell the "Aguilar" brand and the "La Copa" brand, and I also sell some of Patricio Ubeda's brand.

Q. How many different Bell brands do you sell in your store?

A. We also sell another brand with Three Bells on the label.

Q. Do you not sell any brand with a single Bell on it?

A. No, sir.

Q. With Four Bells?

A. I do not remember. When we get an order from the
57 provinces, but we do not keep it in the store.

Mr. KINCAID: I now offer to introduce in evidence a bottle more recently used by the plaintiff, with the trademark and seal, and also with this distinctive device on the other side of the bottle, and ask that the same be marked Exhibit "E."

The COURT: The bottle with the tassel on it is admitted in evidence.

Testimony of Serafin Palanca.

Having been first duly sworn, testified as follows:

Q. What is your name?

A. Serafin Palanca.

Q. What is your business?

A. Storekeeper.

Q. Where do you live?

A. On Calle Jaboneros.

Q. Do you know the plaintiff, Patricio Ubeda?

A. Yes sir.

Q. For how many years have you known him?

A. I have known him for a long time now.

Q. Since the Spanish times?

A. Yes sir.

Q. Do you know the trademark used by him known as the "Tres Campanas" brand?

A. Yes sir.

Q. For how many years have you known that brand?

58 A. I cannot remember. I have known it for three or four years.

Q. Who was using that trademark all that time?

A. Patricio Ubeda.

Q. Have you seen any gin with that trademark on it?

A. Yes sir.

mended to Mr. Mojica, who was then in partnership with my
62 brother. We intended to organize a company. And we sent to the printer to have some labels made bearing the representation of Three Bells, in the name of Patricio Ubeda. We failed, however, to organize the company. I took the trademark with me and opened my place of business on Calle Anda and commenced then to use, among others, the Three Bells trademark. Subsequently I had it registered and I asked the man in charge of the Registry whether this trademark could be registered, for the reason that there was another brand with a single Bell in existence at the time, and he said, why yes, a similar trademark has been registered in Spain but the patent has lapsed so you can now register this without any objection but we should first write to the society, Amigos del Pais (Friends of the Country). I was then told to present my application, which I did, and not only the patent but the label as well were duly registered by the said society, Amigos del Pais (Friends of the Country), and since then my trademark has been registered.

Q. You were informed that there was at the time a registered mark bearing the representation of a single Bell but that the patent had lapsed. Is that right?

A. Yes sir. I was told that it had lapsed and that for that reason my own trademark would be accepted.

Q. Do you know the trademark shown on Exhibit "C," which I now present to you?

A. Yes sir, I know it perfectly well.

Q. For how many years have you known that trademark?

63 A. I left for Spain in 1900. I do not remember exactly but I think I left here some time in October or in November and I arrived in Spain in April or May; when Benito Legarda joined me in the business. I can explain, if necessary. I remained six months in Spain and when I returned to the Islands I continued the business. When I left for Spain I did not know this brand here on Exhibit "C." I could hardly imagine that it existed at all. I only noticed it in 1902.

Q. Was it then when you first saw that brand?

A. Yes sir, and the article was put up by some Chinaman. I did not know where he lived or where he was. I made inquiries but they were unable to tell me where he lived.

Q. When did you first use that seal?

A. When I was awarded the prize at the Hanoy Exposition. After I got it I had the lithographer make me this label. This was in 1903 or 1904 when I was awarded that prize.

Q. When you put that seal on your labels what happened?

A. He just put it on his. Formerly he did not use it at all. When he saw that I was using this label he also fixed up his. I had never seen this one before and I doubt if anybody else has.

Q. Have you done anything else to avoid any imitation of your trademark?

A. Yes sir. He compelled me to do it. First I put a notice in all the papers and sent out circulars warning the people to look out for

the name of Patricio Ubeda and to distrust all other Bell brands in existence. In order to show it better I put this notice
64 (indicating the one in Exhibit "A") to prevent the people confusing the two brands. My idea was to distinguish my article from all others.

Q. You are now referring to the paper pasted on the face of the bottle on the other side of the label bearing your trademark and seal, are you not?

A. Later I thought that this piece of paper was not enough because they continued to imitate my brand and I conceived the idea of a locomotive, so that the bottles in which my article is now put up bear a label with a representation of Three Bells and one locomotive and, right below, the seal that I have always used.

Q. I now ask the court to allow these three labels in evidence and that they be marked Exhibit "F" and that they be pasted on in the same way in which they are pasted on the bottle.

Q. It is pasted on the paper in the same order in which it is pasted on the bottle, is it not?

A. Yes sir.

Q. Have you confined yourself to these labels on Exhibit "F" or have you used any additional ones?

A. In addition to that I have pasted this notice on the bottle "Notice to my Customers." This notice follows in Tagalog and is dated "March, 1906. Patricio Ubeda."

Q. I now ask that this notice be pasted on a blank piece of paper and that it be marked Exhibit "G." Also that it be admitted in evidence.

Q. Do you know whether this Exhibit "F" has been imi-
65 tated or not?

A. They have not gone that far yet. I have not seen the locomotive on any label so far. They have not imitated that.

Q. What about the notice on the back of the bottle?

A. I have not seen that either.

Q. When did you first use Exhibit "F"?

A. At the time I had this liquor brand here registered. I have the registry certificate here. As soon as I had it registered I placed it on the bottles, some time in April, this is the name of the liquors.

Q. 1906?

A. Yes sir.

Q. I now ask the court to allow this patent in evidence and that it be marked Exhibit "H."

Mr. DIOKNO: Without objection.

(Paper marked Exhibit "H.")

Q. Do you know the quantity of gin sold by the defendant under the trademark on this bottle Exhibit "C"?

A. I cannot say. I know that the article may be found in any of the Chinese stores and the result is that the price according to what the Chinese themselves have told me——

Mr. DIOKNO: I object to anything that is hearsay.

The WITNESS, continuing: Tomorrow I will introduce some other evidence, because there is a man who bought from another man——

The COURT: Well, that is not necessary.

66 The WITNESS, continuing: Well, I do not know.

Q. I know that a long time has passed, but in order to refresh your memory, we know the amount he admitted he had sold and the profits realized by him. Don't you remember that, that we had all that data?

A. Yes, I remember, but my recollection is not clear now. My head is not well now. I have taken some medicine and it may be that this afternoon I can tell you but not now.

Q. Don't you remember that we were able to figure out the profits that had been realized from the sale of this gin?

A. I think we can estimate it at the rate of four pesos and some odd cents.

Q. Do you remember how many cases he admitted having sold?

Mr. DIOKNO: I object to the question for the reason that nothing has been said so far about such admission.

Q. Do you remember whether the defendant has sold any specific number of cases?

A. Yes sir, I do.

Q. Do you remember how many cases?

A. At this time I cannot but I do remember that when this gentleman came to my house to settle this matter with me he told me the name of the man who had sold the gin and that he had no objection to showing the books to Mr. Legarda, my partner, with a view to a compromise, but I am not sure of the number of cases. I cannot say anything except what I remember distinctly.

Q. Since he began to sell this gin with the trademark and seal shown on Exhibit "C," have you noticed any change in your

67 sales?

A. Yes sir.

Q. What is it?

A. I have noticed a decrease of about two or three hundred cases per month. This gentleman here sells his article at P11. a case and the gin in white bottles at P13. and P14., while I sell my article at P19.50 a case, with a certain discount, but the difference in price is great, as you can see, and this is the reason why they have caused such a decrease in my sales.

Q. They sell their article cheaper than yours?

A. Yes sir.

Q. By how many cases have your sales been reduced?

A. By some two or three hundred cases a month.

Q. And for how many years has this occurred?

A. I have kept track of it for the last two years, to be sure during the last two years.

Q. Do you know whether he uses that trademark now?

A. That trademark is used in the market by a Chinaman at present and he is selling great quantities of the article. I do not know

who prepares that gin now. I have been told that the party is a Chinaman.

Q. You do not know whether the article is put up by the defendant here, do you?

A. I do not know whether the defendant is the one who prepares the gin.

Q. You do not know whether the business belongs to him or not, do you?

68 A. No sir, I do not.

Q. Something has been said here about a tassel used by you on these bottles?

A. I used this tassel for the purpose of distinguishing my bottles from other gin bottles in the market. My only idea is to show to the people that the bottles in which my article is put up may be distinguished from the other bottles in the market, even at a distance of fifteen meters. From a distance of about fifteen meters you can tell whether it is my article or not. That was my purpose in using so many labels as I used.

Q. Something has been said here about the appearance of the bottles. Will you explain this?

A. We generally used square-faced bottles indiscriminately. I think, however, that I am the only one who imports black and white square-faced bottles, with my trademark blown on them. The other distillers use any kind of bottle. I also use all kinds of bottles. The bottle makes no difference. It is the label that counts. My label has always been the same. If I use water "H" I put four. The difference, true, is four. If one uses "A H" on any American or European bottle the label is always different, of a different shape. I use this tassel here in order to fasten this strip of paper with the name "Patricio Ubeda" printed on it. Sometimes they pull out the cork and fill up the bottle with another different kind of gin and hence the reason for my using that strip of paper on my gin bottles.

69 Q. Have you ever bought any gin from the defendant?

A. No sir, I do not remember having bought any gin from him.

Q. I will refresh your memory. Don't you remember having been in my office one day with a receipt?

A. Yes sir. I did not buy that from the defendant. I bought it from a Chinaman. This witness is not here now but I have the invoice of Internal Revenue Department which shows that I bought——

Q. Oh, this witness is not here?

A. No sir.

Q. Well, I will call you later.

Cross-examination by COUNSEL FOR DEFENDANT:

Mr. DIOKNO: Why did you leave Manila in 1900?

A. To recuperate my health, as I did in 1903 and 1904.

Q. Were you not prosecuted by the Board of Health for selling that very gin?

A. I do not understand English. I do not understand what you say.

Q. Were you ever prosecuted by the Board of Health for selling gin?

A. Prosecuted! No sir, I have never been prosecuted. A gentleman from the Health Department went to my house and told me that he had seen different kinds of liquors in the market in Manila and that he thought the one sold by me was not very good,
70 adding that the aniseed and the rest was all right. He also said to me that if the article was found to be unfit for sale that I would have to throw it away. I said to him "Mind you, this is a very nice stuff." I opened the bottle and he exclaimed "Why sure, this is very nice stuff indeed; there must be some mistake about this". He came to my house on another occasion, bringing a bottle with him and said "Well, well, this stuff of yours is very good, you do not have to throw away anything."

Q. When you returned from Spain, who was using that trademark with the Three Bells?

A. Nobody except me. But Mr. Attorney, please excuse me. I left some gin, aniseed and other articles manufactured by me with the owners of the stores "The Island of Cuba", "The Cantabric" and other parties. By the way, I did not prepare that at the distillery of Benito Legarda. It was the last I distilled before I left for Spain and they sold the article here during my absence in Spain. The quantity of liquor remaining on hand when I came back to the Islands, I contributed to the firm "Tuason, Legarda and Co." when I became a member of it.

The COURT: The hearing of this case is continued to the 24th of this month at 8:30 a. m.

I hereby certify that the foregoing is a true and correct transcript of the stenographic notes taken by me in this case.

(Signed) FELIPE A. DE LA CAMARA.

71 *Continuation of the Trial.*

MANILA, *February* 8, 1907.

Before the Honorable Manuel Araullo.

Present:

W. A. Kincaid, Counsel for Plaintiff.
Felipe Buencamino and Ramon Diokno, Counsel for Defendant.
Ricardo Aguado and —— ——, Assessors.

Cross-examination of the Witness Patricio Ubeda Continued.

Mr. BUENCAMINO: Do you remember, Mr. Ubeda, the contents of paragraph 8 of your complaint?

A. No sir.

Q. I will take the liberty to read the same to you from the copy of the complaint with which we were served. (Counsel reads the paragraph in question.)

Q. Do you remember now?

A. Yes sir.

Q. Do you remember that in answer to a question addressed to you by your own attorney, as follows: "Something has been said here about the appearance of the bottles. Will you explain?" you said in reply thereto: "We generally use square-faced bottles indiscriminately. I think that I am the only one who imports
72 black and white square-faced bottles, etc. and so on." Do you remember this too?

A. Yes sir.

Q. Now, will you explain why in the complaint you charge Mr. Zialcita, the defendant in this case, with having used your bottles, when you yourself say that all of you distillers use anybody's bottles indiscriminately, that the bottle did not make any difference, that the label was the whole thing. Will you kindly explain this inconsistency, if you will. Mr. Ubeda? This is a charge which you make in your complaint and of which you practically relieved the defendant by your answer to the question propounded by your own attorney.

Mr. KINCAID: There is no human being that can answer that question. It is an argument advanced by this gentleman here and now he invites the witness to answer it.

Mr. BUENCAMINO: I am quoting facts, Your Honor.

The COURT: It is said in paragraph 8 of this complaint that the defendant has been using bottles with the trademark of the plaintiff blown on them for the purpose of defrauding the plaintiff and deceiving the public. In answer to a question by his own attorney, the witness stated that it was the custom among distillers to use bottles belonging to other manufacturers indiscriminately, is it not so?

The WITNESS: Yes sir.

The COURT: That is what the witness said, and now, Mr. Attorney, what is it that you want him to explain?

Mr. BUENCAMINO: I want him to explain the conflict be-
73 tween the two statements. I think Your Honor, that this is very important. This is a question of fact and the real facts have to be established.

The WITNESS: I am going to answer. I think that when my attorney used that language—because the complaint was prepared by my lawyer—he merely followed what I had said to him. Imitators always pay more for my bottles with my trade-mark blown on them. This is well known to everybody. Of course, they always try to secure those bottles, particularly in order to make the imitation more complete. As to the others, however, I cannot say. As for me it is absolutely immaterial. I do not object to the bottle. What I object to is the imitation of my label.

Q. I am satisfied with that. Do you remember the allegations contained in paragraph 9 of your complaint, which I will read to you?

The COURT: Let the witness read it himself.
The WITNESS: Yes sir.

Q. The assessors have no copy, have they? I ask the permission of the court to read paragraph 9 of the complaint. (Counsel reads)—addressing the witness——
Q. Do you also remember this and ratify it?
A. Yes sir.
Q. I will show you Exhibits "E" and "C" and will ask you whether those labels and papers are the ones which you say the defendant has attempted to imitate and which according to you only differ in that the label bears the words "Two Bells Gin" in-
74 stead of the words "Three Bells Gin" and that in the center the name of "Gabino Barreto" appears in place of the name of "Patricio Ubeda"?
A. Yes sir.
Q. Will you please state if the label on Exhibit "C" has the same fringe around it as that on Exhibit "E"?

The COURT: I will put the question to the witness myself. You show him the two bottles so that he may compare the one with the other. Now I will show to the witness the two bottles marked Exhibits "C" and "E", respectively, and will ask him to state by looking at the labels on each bottle whether there is any difference between them as alleged in paragraph 9 of the complaint other than that the words "Three Bells Gin" are used instead of the words "Two Bells Gin" and that in the center instead of the name "Patricio Ubeda" the name of "Gabino Barreto" appears.
Mr. KINCAID: I object to the question. The labels will show for themselves. The court can see that as well as the witness himself.
Mr. BUENCAMINO: Wait a second, sir, I have not finished yet,—addressing the witness——
Please examine this piece of paper marked Exhibit "E" and state to the court whether this label Exhibit "E" has a serrated edge and whether the other label has not.
Mr. KINCAID: I object to the question because having exhibits before him the court can see for himself whether there is any difference or not. If in such a matter we were to take into con-
75 sideration the opinion of witnesses, who need not be experts for that matter, why we would never get through with this case.
The COURT: Objection sustained, because, as a matter of fact, the judge can see that for himself, so can the assessors, the public and the parties in interest. The most that counsel can ask in order to avoid the possibility of that serrated edge disappearing from the label marked Exhibit "E" is that the record show that the label has such serrated edge.

Mr. BUENCAMINO: With my exception. You can see that the label marked Exhibit "E" has a serrated edge?
A. Yes sir. I can see it.
Q. You can see too that there is no such serrated edge on the label marked Exhibit "C"?

A. I think so.
Q. And that makes no difference, does it?
A. No sir, no difference at all.

Mr. KINCAID: That is a question of law.
The COURT: Yes sir, it is.
Mr. BUENCAMINO: Well, I will withdraw the question.

Mr. BUENCAMINO, addressing the witness:

Q. Mr. Ubeda, can you tell us whether this bottle Exhibit "D" was introduced in evidence by the plaintiff?

The COURT: The court will not allow that question to be put to the witness.

Q. Mr. Ubeda admits that this seal here with inscription
76 "Three Bells" is his Exhibit "D", does he?
A. Yes sir, with inscription "Three Bells," yes sir.

Q. Mr. Ubeda, of course, also admits that the cork on the bottle marked Exhibit "C" has a representation of a grape-vine leaf stamped on it?
A. Yes sir.
Q. I will now show this circular to the witness and will ask him if it is and request the court that it be marked defendant's Exhibit "1"?
A. That circular was issued by the firm "La Rosario" of which firm I was a member.
Q. This circular had for its purpose to advertise the gin manufactured by you, and to sell the same, under the trade-mark "Three Bells"?
A. Yes sir.
Q. This advertisement, copy of which we now introduce in evidence as Exhibit No. "2", do you admit that the same was published with your knowledge and consent and for the purpose of advertising and promoting the sale of your gin with your trademark?
A. Yes sir. This was done by the firm "La Rosario", also with my consent. (Exhibit No. "2".)
Q. The trademark which appears on Exhibit "C" of Babino Barreto, with Two Bells, when was it ever used by Mr. Zialcita, the defendant, if you know, and, if you do know, please tell us, will you?

A. I think that the record already shows that. That ques-
77 tion that you now ask me I think has been answered before by the other witnesses who testified upon the first session.

Q. No sir, you are mistaken. It has nothing to do with those witnesses. I want you to fix the date.
A. I think I have already testified about this matter. I cannot say exactly when, but, of course, there is a letter attached to the record, signed by Mr. Zialcita, and I think that about a year prior to that letter I notified Mr. Zialcita. I never had the pleasure to meet Mr. Zialcita. But I warned his agent to withdraw the Two Bells. He promised me that he would do it. I finally sent him a letter and he said that he would not use that trademark again. Consequently I think it must have been used by him for the first time

at least about a year prior to that letter. I do not remember exactly now when this was.

Q. The statement by Mr. Zialcita that he would not use the trademark again, was that made to you verbally or does it appear in the letter to which you refer?

A. He told me so personally; not Mr. Zialcita, however, but Paco, a heavy-set fellow.

Q. My question is whether or not Mr. Zialcita himself made that statement to you?

A. No sir. The statement was made by his agent, but I sent a registered letter to Mr. Zialcita and Mr. Zialcita came to my house but I was not at home and he wrote it down and left it there.

Q. So, Mr. Zialcita never talked to you personally about
78 this matter, did he?

A. No sir, he spoke to my agent, not to me.

Q. So when you say that Mr. Zialcita promised to you that he would not use the trademark any more, this alleged promise was not made directly by Mr. Zialcita to you but it was made by somebody else, is that right?

A. Yes. His agent is the man who made the promise.

Mr. KINCAID: He has said that about five times, that it was the agent and not the defendant himself.

The WITNESS: I always thought that the agent or the man in charge there was Mr. Zialcita. I did not know until now that he was not Zialcita.

(Mr. Buencamino, not being in good health, asked the court's permission to continue the cross-examination of the witness Ubeda through Attorney Diokno. The petition having been granted by the court, Mr. Diokno proceeded with the examination as follows:)

Mr. DIOKNO: Now, Mr. Ubeda, it is understood that your bottles and trademark can be distinguished or recognized at a distance of fifteen meters by reason of that tassel that you have seen fit to tie to the bottles. Am I right?

The COURT: I think that the witness has already testified to that effect. I think he can now answer the question.

The WITNESS: I referred to the question that you asked me before. At a distance of fifteen meters my goods can be recognized and identified today, that is to say, at the present time, not
79 before. I have been compelled under the circumstances and by reason of the imitations to use an additional trademark with the representation of a locomotive, of which I have a registered trademark on file in this court. Therefore, my goods, having now practically three trademarks on them, of course they can be very easily identified at a distance of fifteen meters. But formerly when Mr. Zialcita was selling gin with the representation of Two Bells on the label, I only had two labels and, therefore, the people could be very easily deceived.

The COURT: That is to say, with so many trademarks on the bot-

tles your goods, of course, may be easily identified at the distance of fifteen meters, is that what you mean?

A. Yes sir.

Mr. DIOKNO: It is a fact Mr. Ubeda, is it not, that the bottle bearing the label with the representation of Two Bells owned by Gabino Barreto cannot be identified and recognized at a distance of fifteen meters, can it?

Mr. KINCAID: I object to the question because, as a matter of fact, the labels themselves are right there and the assessors, as well as the judge, can see them the same as the witness. This would merely be the witness' personal opinion, which would not be binding either upon himself or anybody else.

Mr. DIOKNO: The witness has stated in answer to a question propounded by my distinguished colleague Mr. Kincaid that his, the witness' bottle, that his square-faced bottle, bearing his label, may be identified at a distance of fifteen meters.

Mr. KINCAID: I do not remember that.

80 Mr. DIOKNO: Well, here is the question and answer. (Counsel reads.)

Mr. KINCAID: The witness said that his purpose was to distinguish his gin from all others.

The COURT: The question is propounded by counsel whether the square-faced bottles used by Gabino Barreto can be identified or distinguished at a distance of fifteen meters. I think that the witness should answer this question because he has already testified to that effect and has explained how his own trademark can be identified at a distance of fifteen meters.

A. Well, I have to answer to that. At the time the complaint was filed the gin bottles of mine only had two labels. When I stated that my trademark could be distinguished and identified at a distance of fifteen meters I meant the trademark in its present condition but not in the condition in which it was at the time the complaint was drafted. When the complaint was prepared the bottles had two labels; Barreto's bottles also had two labels. Therefore the people could hardly distinguish one from the other. A year later and in view of the fact that the Two Bells gin continued to be sold here in Manila, I was compelled to register an additional trademark with the representation of a locomotive and, therefore, it can be easily recognized at a distance of fifteen meters. I do not mean that it could be so distinguished at the time the complaint was filed. At that time the bottles only had two labels. Therefore, the question asked by——

Mr. KINCAID: I desire to call the attention of the court to
81 one fact and that is that, notwithstanding the statement made by the witness for the purpose of explaining the immateriality of such question, his opinion does not seem to me to be correct. He is an expert and he knows his own trademark perfectly well but I wish to say to the court that those two trademarks would certainly deceive me; if I were to forget all about this litigation, I would buy

Barreto's brand as quickly as I would buy Ubeda's, without paying any attention, in the belief that it was Ubeda's.

Mr. DIOKNO: Is it not a fact, Mr. Ubeda, that you have been selling your gin in square-faced bottles, with that tassel on it since 1902, since about the middle of 1902: I mean the bottles with the tassel attached in the same form as that of Exhibit "C" introduced by the plaintiff?

A. Well, I do not understand the question.

The COURT: Well, I will repeat it to you.

The WITNESS: You mean prior to 1902?

Mr. DIOKNO: Yes and in 1902 too.

A. I think that nothing of the kind was used in 1902. I believe that I commenced to use it later than that.

Q. But you cannot testify positively that in 1902 that tassel was not used?

A. Yes. I can tell you positively because I can easily ascertain when I received those seals. It was in 1903 I believe.

Q. And you have used that tassel since then, have you not?

A. Yes, I used it on the white square-faced bottles.

Q. Was that in 1903?

82 A. I cannot say whether it was in 1903 or 1904. I think it was in 1903.

Q. What about this long notice which appears on the side of the bottle opposite the labels shown in Exhibit "E," how long have you been using that?

A. I think the date is stated on the notice itself. I do not remember.

Q. More or less approximately the year in which you began to use it? Please examine the seals.

A. This must have been in 1905 because I received notice that I had been awarded a gold medal at the St. Louis Exposition in 1905. It must have been about that time.

Q. You mean about the middle of 1905?

A. It may be. The St. Louis Exposition was in 1904 but we did not receive the award until 1905.

Q. When did you return to Spain. When did you leave the Philippines?

A. I think it was in September.

Q. What year?

A. 1900.

The COURT: The witness has already answered that question.

Mr. DIOKNO: Well, when did you come back to the Philippines?

A. In 1901. In May I think it was.

Q. And this trademark "Three Bells" was then used by you and by the firm "Tuason, Legarda & Co.," was it not?

A. Yes sir.

83 Q. At the time the complaint was filed in this case, were you not the party who paid the internal revenue license for the use of that trademark?

A. Well, just wait. In the case of a firm each of the members

pays his own share. The firm of Tuason, Legarda & Co. paid its share. The account kept with the distillery by Mr. Ubeda with Messrs. Legarda & Co. was also charged with its share. But it was all the same because it was all the same firm. The revenue licenses were paid by Messrs. Tuason, Legarda & Co., not by me, because I had nothing to do with that, the firm paid for it.

Q. You had a license to manufacture gin and liquors in your own name, had you not?

Mr. KINCAID: I object to the question as immaterial.

Mr. DIOKNO: We insist on this question being allowed, Your Honor, for the reason that it is a necessary requisite that the party should provide himself with a license before he can sell liquors.

The COURT: The objection is overruled, although, as a matter of fact, the witness has already said that he was partly entitled to the benefits of the license because as a partner he had a participation in the company.

The WITNESS: The ones who had the license were Messrs. Tuason, Legarda & Co., of which firm I was a partner.

Q. The license was not in your name, was it?

A. No, sir. It could not be, it had to be in the name of the firm.

84 Q. And the firm of Tuason, Legarda & Co. was the one which was using your trademark even some time before you filed your complaint, and, in any event, at the time you actually filed your complaint, is that right?

A. The trademark was used by the firm of Patricio Ubeda, Tuason, Legarda & Co.

Q. But it was not the firm of Patricio Ubeda, Tuason, Legarda & Co. that paid for the license, I mean the parties that had a license for the manufacture and sale of that gin, was it?

Mr. KINCAID: I object to the question as immaterial.

Mr. DIOKNO: I insist that the question is proper, Your Honor.

The COURT: Objection sustained.

Mr. DIOKNO: With my exception. I ask the court to have the record show the difference between the trademarks introduced here in evidence in case that they should disappear from the files.

Mr. DIOKNO, addressing the witness:

Q. Is it not a fact, Mr. Ubeda, that this trademark used by you is not registered at present (showing to the witness the square-faced bottle with the tassel attached)?

Mr. KINCAID: That is a question of law.

The COURT: Let the witness answer the question. The objection is overruled.

A. Well, this label is exactly the same as the other. The only difference is that this one here is embossed. Otherwise it is

85 the same label.

Q. How long have you been manufacturing gin and liquors generally?

A. For about 26 or 28 years.

Q. You mean in Manila?

A. In Manila—wait a second; I think I began to manufacture liquors here in the year 1896.

Q. You have never imported gin from Amberes, have you?

A. Yes sir. I ordered gin from Amberes in barrels for the purpose of having the same bottled here in Manila and it was for this reason that the first trademark was prepared. But in view of the fact that the prices were not satisfactory and that the gin become colored, we stopped importing gin in barrels and decided to prepare the stuff here ourselves.

Q. And the gin which you sell now was not prepared in Amberes but it is prepared by you here in Manila, is it not?

A. Yes sir. It is prepared right here in Manila. Formerly the label read "Amberes" but now I have substituted the word "Manila" in small letters, as you can see from the label itself.

Q. Then you have no registered trademark that will authorize you to manufacture the article here in Manila, have you?

A. Yes sir. I have a registered trademark under which I can manufacture the article right here in Manila.

Q. You mean the Three Bell brand?

A. Yes sir, the Three Bell brand, under which I can sell Amberes gin, but it is all the same from Manila.

86 Mr. KINCAID: The trademark is not used for the purpose of manufacturing or selling but for the purpose of distinguishing the wines prepared by you.

Mr. DIOKNO, addressing the witness:

Q. Do you know whether Mr. Zialcita has ever sold any of that gin of the Two Bell brand at retail?

A. I do not quite understand that word.

Q. Do you know whether Mr. Zialcita has ever sold at retail any of that gin with the trademark of Gabino Barreto?

A. I do not know.

Q. That is all.

The COURT: Instead of describing in the record the labels on each one of the three square-faced bottles of gin introduced in evidence and marked Exhibits "D," "C" and "E," respectively, counsel for defendant is required to file a sample of each of the three labels conveniently pasted on three separate sheets of paper, and the clerk of the court will certify that such samples correspond to the labels on each of the three square-faced bottles of gin. As to the design on the cork on each of the said bottles, in as much as they cannot be shown in any manner except by describing them in the record, counsel may so describe them.

Mr. DIOKNO: I wish to have the record show that the square-faced bottle of gin marked Exhibit "E," which has on the neck a seal with a metal badge and a red and yellow tassel is corked without any metal cap; that Exhibit "D" has a metal cap over
87 the cork, with the words "Patricio Ubeda" printed on them and an embossed representation of Three Bells; that Ex-

hibit "C" also has a lead cap with a grapevine leaf stamped on it. And I now ask the court that the plaintiff be required to furnish those labels for the reason that we do not have any bearing that trademark.

Mr. KINCAID: I now ask the court and counsel for the other side as well to permit me to introduce in evidence a copy of the award at the St. Louis Exposition, which I will read to the court. I introduce the same in evidence and ask the court to direct that the original be detached from the record, leaving a certified copy thereof in its stead, I mean of the award of the St. Louis Exposition of a gold medal to the plaintiff for his wines and liquors.

Mr. DIOKNO: No objection.

The COURT: Let the document be admitted in evidence and a certified copy of the same be attached to the record.

The document is marked Exhibit "I."

Testimony of Miguel Morales.

After being first duly sworn, testified as follows:

Mr. KINCAID: What is your name?

A. Miguel Morales.

Q. Where do you live?

A. 120 Cabildo, Walled City.

Q. Your occupation?

88 A. Sexton of the Cathedral.

Q. Your age?

A. 39 years.

Q. Do you know Mr. Ubeda?

A. Yes sir.

Q. Do you know the trademark that he uses in the sale of his gin?

A. Yes sir, I do.

Q. Do you know of another trademark which is said to be used by the defendant in this case, with the name of Gabino Barreto?

Mr. DIOKNO: I object to the question because those words, "said to be used" are not a question addressed to the witness. They are hearsay.

Mr. KINCAID: I will change the question. (To witness:)

Q. Do you know any other trademark used by the defendant with the name of Gabino Barreto?

A. No sir, I do not.

Q. Do you know a trademark bearing the name of Gabino Barreto, irrespective of the person who uses that trademark? Do you know this trademark here (indicating Exhibit "C")?

A. Yes sir. I recognize it now.

Q. Have you ever bought any gin of this brand?

A. Yes sir.

Q. When?

A. Some time in the month of September, the 15th of September.

89 Q. Of what year?
A. Last year.
Q. Where did you buy it?
A. On Calle Fundidor, near Santo Cristo Street.
Q. In Manila?
A. No, in Binondo. I do not remember the number of the house.
Q. Did you buy it in a store or where?
A. I think I bought it direct from the factory; I do not think it was a store but a factory or distillery.
Q. Did it look to you like a distillery?
A. Yes sir.
Q. Distillery of what?
A. Of liquors.
Q. What quantity did you buy at that time?
A. A case.
Q. How many bottles in the case?
A. Fifteen square-faced bottles.
Q. Did they give you a bill?
A. Yes sir.
Q. Do you still have it?
A. Yes sir.
Q. Did they give you this paper here?
A. Yes sir.
Q. I now beg to introduce in evidence these two documents just identified by the witness. (J and K.)

90 Q. Do all these bottles bear all the labels which appear on Exhibit "C"?

A. Yes sir.
Q. With this name, Gabino Barreto?
A. Yes sir.

Mr. DIOKNO: I object to the question.
The COURT: Objection overruled.
Mr. KINCAID: Do you remember how much you paid for this case of gin?

A. Yes sir.
Q. How much?
A. Forty-one Pesos (P41.00).

Mr. DIOKNO: We object to the introduction of those two Exhibits, "J" and "K," for the reason that they do not refer to any facts alleged in the complaint.

Q. The person who sold that case of gin to you, did he ask you any questions before he made the sale?
A. Yes sir.
Q. Please state to the court what he said.
A. The Chinaman asked me where I was going to take the gin?

Mr. DIOKNO: I object to any further testimony by this witness upon those points because I cannot see the materiality of it.

The COURT: Objection overruled. His testimony is pertinent. I should say so.

Q. What else did he ask you?

A. He asked me whether I was going to sell it to some-
91 body else and I told him that I did not because I had to send it to Pangasinan to my uncle's house, where I expected to spend two months' vacation. I was taken ill, however, and could not take my vacation.

Q. Did you try to buy the article on credit or did you pay for it in cash?

Mr. DIOKNO: I object to the question. We are not concerned with whether the witness paid for the gin or not.

The COURT: Objection overruled.

The WITNESS: I paid cash.

Mr. DIOKNO: Exception.

Q. You said that you paid cash, did you not?

A. Yes sir.

Q. Please state to the court whether that person sold you the article reluctantly or not.

A. It seemed that the person who sold me the gin did not want to sell me the goods and when I told him that I intended to take the gin to the provinces to an uncle of mine in Pangasinan. He asked me whether I intended to sell it to somebody else. I told him that I was going to send this case of gin to the provinces. When he satisfied himself that I was not going to sell it to anybody else, he sold it to me.

Q. Was it a case of gin, was it?

A. Yes sir.

Q. And of the same brand as this bottle here?

A. Yes sir.

92 Q. Is not this one of the bottles that were taken out of the case?

A. Yes sir.

Q. The same as the bottle marked Exhibit "C"?

A. Yes sir.

Q. I now insist on the introduction of these two documents in evidence.

Mr. DIOKNO: With our objection.

The COURT: The two documents are admitted in evidence. They are material. They constitute an integral part of the testimony of the witness.

Mr. DIOKNO: With my exception.

Cross-examination by COUNSEL FOR DEFENDANT:

Mr. DIOKNO: Did you look for the Two Bells brand particularly?

A. Yes sir.

Q. And do you also know the Three Bells brand?

A. Yes sir.

Q. And you preferred to buy the Two Bells brand rather than the Three Bells brand, did you?

A. I had no preference for the Two Bells brand. I simply asked the Chinaman whether he had the Three Bells brand. He told me that he had not. I noticed that he had some of the Two Bells brand bottles on shelves and I asked him "Is that also for sale?" and he said "Yes" and I replied "Well, I will have some of it."

93 Q. Then you bought the gin knowing that it was not of the Three Bells brand?

A. Yes. It was the Two Bells brand.

Q. You undoubtedly read this bill or receipt, marked Exhibit "J," when it was delivered to you, did you not?

A. Yes sir.

Q. And how did you construe this abbreviation here: "Cop?"

A. The Chinaman told me that it meant Two Bells.

Q. And that is what you thought it meant?

A. Yes sir.

Q. Besides the Three Bells and the Two Bells brands of gin, you also know other brands bearing the representation of a number of Bells, for instance, the Four, the Five and the One Bell brand?

A. No.

Mr. DIOKNO: That is all.

Mr. KINCAID: I offer in evidence and ask that it be marked plaintiff's Exhibit "L," the contract as to the account in participation carried by and between Benito Legarda and Patricio Ubeda.

Mr. BUENCAMINO: We desire to say that this document is absolutely illegal, for while it purports to be an account in participation, nevertheless, the party actually has a share in the business. Those who keep such an account with a firm have no intervention whatsoever in the business. The manager of the firm is the one who conducts the business. We object to the admission of the document for this reason only.

94 The COURT: The document is admitted in evidence.

Mr. BUENCAMINO: With our exception.

Mr. KINCAID: The certificate of the award at the Hanoy Exposition is a very large picture and we will introduce the same in evidence if counel for the other side has no objection. I now offer in evidence this document and ask that the same be marked plaintiff's Exhibit "L," the same being a photographic reproduction of the award issued by the Hanoy Exposition, which reads: "Republique Francaise."

Mr. PATRICIO UBEDA is recalled as a witness:

Mr. KINCAID: I will show you two seals which appear to be exact copies of each other, with the exception that one of them contains the words "Gabino Barreto" and the other the words "La Fuerza," which have been marked for identification as plaintiff's Exhibits "N" and "Ñ," and will ask you whether you recognize them.

A. Yes sir.

Q. Where have you seen them?

A. This one bearing the name of Gabino Barreto on the bottles used by Mr. Zialcita.

Q. In his distillery?

A. On the bottles. And this other seal here is used by somebody else, whom I do not know.

Q. On what bottles?

A. On the square-faced bottles of gin.

95 Q. This bearing the words "La Fuerza," is it used on the bottles bearing the name of Gabino Barreto, as on Exhibit "C"?

A. Yes sir.

Q. I see that the bottle which we have before us bears the same seal with the name of Gabino Barreto on it, does it not?

A. Yes sir.

Q. Do you mean to say that at present they are using also the same seal with the same words, "La Fuerza"?

Mr. DIOKNO: I object to the question as leading.

The COURT: It is leading. Counsel may ask the question in some other form.

Mr. KINCAID: I withdraw the question. I see that this bottle, Exhibit "C," bears the seal Exhibit "N." Now I will ask you on what square-faced bottles is the seal marked Exhibit "N" used at present?

Mr. DIOKNO: I object. Counsel may ask any question which is not leading. That question is leading.

Mr. KINCAID: What square-faced bottles did you refer to as bearing the seal marked Exhibit "N"?

The COURT: In the market?

A. I mean to say that after the filing of the complain- I have seen this same label on other bottles bearing the words "Internal Revenue A—1—5." These bottles may be Mr. Zialcita's, the defendant's. Now it says here "No. 570," so that it is not the same distillery now. It must have been after the filing of the complaint that the license was secured.

96 Q. What other marks have the bottles bearing that seal, Exhibit "N"?

A. Well, they bear the words "Gabino Barreto and a representation of Two Bells.

Q. The same as Exhibit "C"?

A. The same as Exhibit "C."

Q. I now offer these two exhibits in evidence.

Mr. DIOKNO: We object to the admission of Exhibit "N" as immaterial. There is no allegation in the complaint to the effect that the defendant uses any trademark with the words "La Fuerza." Further, the witness himself in attempting to identify it said that it belonged to a different distiller.

Mr. KINCAID: No, he said that it must be some other distiller, but as the trademark is the same, we must suppose ——

The COURT: Let them be admitted, because they will facilitate comparison.

Mr. DIOKNO: With my exception.

Mr. DIOKNO, addressing the witness:

Q. I will now show you plaintiff's Exhibit "D" and call your attention to this lead cap, bearing your name, Patricio Ubeda, and an embossed representation of Two Bells, and will ask you to state whether this Exhibit "E" with the tassel attached also has the same cap.

A. Yes sir.

Q. Then all the square-faced bottles bearing that trademark also have a similar tassel attached to them, have they not?

A. Yes sir.

97 Q. That is since you have been using the tassel, is it not?

A. Yes sir.

Q. And you still continue to use it, do you not?

A. Yes sir. Up to the present time, although I have very few of them left and will probably have to get others with something different on them, with my name, Patricio Ubeda.

Q. You have referred to the difference in the paragraphs of the Internal Revenue Act printed on the labels as indicative of the fact that the article is put up by a different distiller, have you not?

A. Yes sir.

Q. Do all the distillers have a particular classification and do you mean to say that there are not two of them classified under the same section and tariff?

A. If they are under the same license, yes.

Q. Then you mean to say that the two distillers cannot have the same tariff, section and classification numbers?

A. I think they can.

Redirect examination:

Mr. KINCAID: There is nothing which prevents a manufacturer from having two factories under different numbers, is not that so?

A. Yes sir.

Q. Nor that when he applies for a license that he can secure another with a different number?

A. Yes sir.

98 Mr. DIOKNO: I object to the question.

Recross-examination:

Mr. DIOKNO: But you are unable to say in this particular action that the classification No. 570 refers to the same factory as the one bearing classification 5?

A. I cannot say.

Mr. KINCAID: Let us stipulate here that the defendant admits having sold prior to the filing of the complaint 500 cases of gin of the Two Bells brand.

Mr. DIOKNO: I prefer that the witness go on the stand and testify to that effect, if he wants to, without any stipulation on my part. We do not agree to any such stipulation. I am not prepared to accept any such stipulation.

Mr. KINCAID: For the sole purpose of fixing the amount of sales by the defendant, I will call him as a witness, with his books of accounts.

The defendant, AGAPITO ZIALCITA, is recalled as a witness:

Mr. KINCAID: You are the defendant in this case, are you not?

A. Yes sir.

Q. Can you state to the court the amount of the sales made by you of the gin in question under the trademark on plaintiff's Exhibit "C"?

A. The books will show. I cannot state the exact number of cases sold.

99 Q. Are these all the book you have?

A. I can bring them all if you want. They are not all here. If the court so directs, I will present all the books since I opened my business.

Q. You mean since you opened your gin business?

A. No sir. I am an old distiller.

Q. Are all the gin accounts in this book?

A. Yes sir. This is the official book kept by me under the supervision of the Internal Revenue Bureau.

Q. Now please say how we can identify this book.

A. It may be identified by looking at this and at the cash-stub-book. It takes considerable time to verify it.

Q. How can I tell from this book whether a particular sale was of this gin or of some other brand?

A. Wherever it says cash, these are all true copies of the official book.

Q. How can I tell the brand of gin?

A. It is impossible, because we have six different brands and all of them appear in that book without the particular brand being specified.

Q. And of what use are these books to us?

The COURT: Then the book does not show the particular brand of gin; it simply says gin?

Mr. KINCAID: What is the total number of cases sold by you?

A. Very few. I cannot say.

Q. Don't you have a memorandum there in your hand?

A. Yes sir.

100 Q. Well, please make an effort and say.

A. Yes, I have a memorandum here, but this includes all the cases of the various brands sold by me.

Q. They aggregate 960 cases, do they not?

A. Yes; 960 during the time I used that trademark with the Two Bells, but I cannot say whether the figures of the bookkeeper are correct.

Q. Well, how many cases of the gin known as the Gabino Barreto brand are included in that total number of 960 cases?

A. I cannot say. It would be too much for me to say.

Q. I do not expect you to tell exactly the number of cases.

A. I think about half of these cases.

Q. Does the number of cases of gin of the Barreto brand amount to 500 cases or more?

A. Thereabouts. There are 970 cases in all and that would be about half of them.

Q. How many bottles in each case?

A. Fifteen. They are square-faced and not round bottles.

Q. At what price did you sell that gin per case?

A. At various prices, from twelve to fourteen pesos, according to the market value of alcohol.

Q. Do you have any fixed price?

A. No.

Q. Cannot you fix an average price?

A. No.

Q. You say from twelve to fourteen pesos, do you not?

101 A. Yes sir.

Cross-examination by COUNSEL FOR DEFENDANT:

Mr. DIOKNO: How long have you been using that mark, "Gabino Barreto"?

A. Since the latter part of March.

The COURT: March of what year?

A. March of 1905.

Q. Down to what year?

A. Down to the latter part of December, 1905.

Q. After that date did you continue to manufacture this article?

A. No.

Q. Why? Please explain.

A. Because when I received the letter from Mr. Ubeda, as I had my own way of doing business and desired to avoid any possible question with other people, I answered his letter. Subsequently I found that Mr. Ubeda's trademark was really registered. I first sent the agent of our distillery.

The COURT: Please proceed.

A. I instructed the agent of our distillery to go and ascertain whether the trademark was really registered.

The COURT: The court will not allow that. That is a fact which is alleged in the answer and must be established at the proper time.

Mr. DIOKNO: Why did you stop selling the article?

The COURT: When he stopped his sales is what we want to know.

102 A. In December last year.

Mr. DIOKNO: We desire to enter a protest and exception against the order of the court to the effect that we cannot ask any questions of the witness except with reference to the sales.

The COURT: I have already stated that if you wish to examine the defendant Zialcita as to other facts, you can do so at the proper time when he is called as a witness for the defence, but for the present your cross-examination must confine itself to the matters upon which he has been questioned on his direct examination, that is to say, as to the number of cases sold by him and the period during which he

sold that particular brand of gin. Also the price of each case and the price of each bottle, etc.

Mr. DIOKNO: With my exception.

Mr. KINCAID: Plaintiff rests.

Defendant's Evidence.

Mr. DIOKNO: The defendant, before introducing any evidence at all, will exercise a right which he has to request that the complaint in this case be dismissed for the reason that the plaintiff has failed to establish the facts alleged in his complaint as the basis of his action.

This motion is based upon the jurisprudence laid down by the Supreme Court of these Islands in the case of the City of Manila versus Jacinto del Rosario.

103 In that case the Supreme Court laid down the doctrine that the defendant has a perfect right to move that the complaint be dismissed on the ground that the plaintiff has failed to establish his cause of action.

In that case, which was tried in this court, the same being then presided over by the Honorable John C. Sweeney, counsel for defendant moved to dismiss the case and the court overruled his motion, and an appeal was taken to the Supreme Court. After the case was submitted to the Supreme Court, that tribunal, after reviewing the evidence, said that the plaintiff not having established the allegations of his complaint, the action was dismissed, and holding at the same time that the court of first instance had committed an error in refusing to entertain defendant's motion.

Upon that authority we base our motion in this case. There is no doubt that in this action the plaintiff has failed to prove many of the allegations of his complaint. The main basis of his action was that there is some resemblance or likeness between the two trademarks. I do not remember exactly the language used, but I think he claims that there is a certain similarity or resemblance between the mark Three Bells of Patricio Ubeda and the mark Two Bells of Gabino Barreto, the plaintiff alleging that he had a right to use said trademark because it had been registered. (Mr. Diokno proceeded with his argument at length, and finally said): For the reasons before stated I ask the court to relieve us of the necessity of intro-

104 ducing any further evidence, and to dismiss the plaintiff's action.

The COURT: The hearing of this case is adjourned to the 15th of this month at 10 a. m.

I hereby certify that the foregoing is a true and correct transcript of the stenographic notes taken by me in this case.

_____,

Official Stenographer.

105 Continuation of the Trial.

MANILA, *March* 23, 1907.

Before the Honorable Manuel Araullo.

Present:

W. A. Kincaid, Counsel for Plaintiff.
Messrs. Buencamino and Diokno, Counsel for Defendant.

DEFENDANT'S EVIDENCE.

Testimony of Mr. George H. Tilbury.

Having been first duly sworn, testified as follows:

Mr. DIOKNO: Please state your name, occupation and residence.
A. George H. Tilbury, Internal Revenue Agent, 24 Medoza, Quiapo.
Q. Do you know Mr. Ubeda?
A. Yes sir. I know him.
Q. Please look at this label here on Exhibit "D" and state who pays the internal revenue license for that trademark.

Mr. KINCAID: I object, it being absolutely immaterial in this case who pays the internal revenue license. That is a question
106 between the merchant and the government exclusively.
The COURT: Objection overruled.
Mr. KINCAID: With my exception.

Q. Who pays the license?
A. Mr. Ubeda.
Q. Now?
A. Yes sir.
Q. Do you know who formerly paid the license for the use of this trademark here?
A. To what license do you refer?
Q. From 1901 to 1906?
A. For 1906 I think it was Tuason, Legarda & Co.
Q. Did Mr. Ubeda have any license for the manufacture of any kind of gin during that time?

Mr. KINCAID: We object to the question for the reason that even though he had no license from the Internal Revenue authorities, he would not lose his trademark.
The COURT: Objection overruled.
Mr. KINCAID: With my exception.

The WITNESS: In his own name, no; in the name of Tuason, Legarda & Co. he had a license.
Q. You mean to say that Mr. Ubeda represented the firm of Tuason, Legarda & Co. during that time, do you not?
A. Yes sir. He was one of the partners of Tuason, Legarda & Co. and, so far as we were concerned, he was a member of the firm.

Q. Do you know what the custom is in the liquor stores
107 when they sell wines?
A. It depends. Sometimes they sell at wholesale——

Mr. KINCAID: I am going to object to that for the reason that it is absolutely immaterial.
The COURT: Objection sustained, for the reason that the question is not clear at all.
Mr. DIOKNO: With my exception.
Mr. DIOKNO, addressing the witness:

Q. I will now show you Exhibit "K" introduced in evidence by the plaintiff in this cause and will ask you whether Tariff A, Paragraph 1, Classification 570, appearing hereon.—well, who owns this license?

Mr. KINCAID: I object to the question for the reason that the document is right here and the court can, as well as the witness, construe the document for itself.
The COURT: Objection overruled.
Mr. KINCAID: With my exception.

The WITNESS: Limiao Suy.
Mr. KINCAID: Has Limiao Suy a license to sell gin?
A. Yes sir.
Q. Has he a license to manufacture gin?
A. Yes sir.

Cross-examination by COUNSEL FOR PLAINTIFF:

Mr. KINCAID: All that you know concerning the subject-matter of the foregoing question is what you can gather from this
108 document, is it not?
A. Yes sir.
Q. Do you know anything of your own knowledge?
A. Yes. This classification here belongs to Limiao Suy; his classification is under Number 270.
Q. But everything appears in the document, does it not?
A. In the document, yes.

Q. I now ask the court to strike this document from the records for the reason that we are simply accumulating evidence here which is absolutely worthless.
The COURT: Let the whole answer of the witness be taken out for the reason that the document is the best evidence.

Mr. DICKNO: Can any person other than the owner of the license sign this document here, Exhibit "K"?

Mr. KINCAID: I object to the question whether some other person than the owner can sign.
The COURT: Objection overruled.
Mr. KINCAID: With my exception.

The WITNESS: If an attorney-in-fact has a power from the owner authorizing him to sign, I think he can sign; that is, provided he has a power-of-attorney.

Mr. DIOKNO: Have you, while inspector of internal revenue department, inspected the books of Limiao Suy?

A. Yes sir. Several times.

Q. Are you sure, without referring to this document, that Classification 570 is the one that corresponds to Limiao Suy?

A. Yes, I am.

109 Mr. DIOKNO: I object to the petition of counsel for the other side.

Mr. KINCAID: I ask the court that the last answer given by this witness, which is practically the same as the previous one, be stricken from the record.

The COURT: But in his last answer the witness has explained why he knows that Limiao Suy is the owner of the license. The ruling of the court directing that that part of the witness' testimony be stricken out is hereby set aside for the reason that the witness has explained the appearance of the Chinaman's signature on this document.

Mr. KINCAID: With my exception.

Testimony of Manuel Iriarte.

Having been first duly sworn, testified as follows:

Mr. DIOKNO: Please state your name, occupation and residence.

A. Manuel de Iriarte, Chief of the Division of Archives, 424 General Solano, San Miguel.

Q. Have you with you the books called for in the subpœna duces tecum addressed to you?

A. Yes sir, I have.

Q. Do you know any brand of gin with a label containing a representation of One Bell?

Mr. KINCAID: What has that got to do with it? I object to that.

The COURT: Objection overruled.

110 The WITNESS: Yes sir.

Q. Who owns that trademark that you know?

Mr. KINCAID: I object for the reason that this gentleman here cannot say who is the owner of a thing. That is a mixed question of law and fact which must be judicially determined. It is just taking from the court and intrusting to the witness the decision of the very point at issue. The whole question here is who is the owner of this trademark.

The COURT: Please first establish the reference that we may know who is the owner of the trademark. The witness here is the chief of that department.

Mr. KINCAID: The books are the best evidence.

Mr. DIOKNO: I will withdraw the question (addressing the witness):

Q. That One Bell brand that you know, is that trademark registered in your office?

Mr. KINCAID: I object to the question unless the date of the registry be fixed, so that we may know whether it can affect this case or not.

Mr. DIOKNO: He is the man in charge of the office and he ought to know.

The COURT: Objection overruled.

A. We have the book here, and the chief of the department too, and if there is any such registry——

The COURT: Go ahead and answer the question.

The WITNESS: Yes sir.

Mr. KINCAID: With my exception.

111 Mr. DIOKNO: From among the papers you have brought with you could you show to us that trademark or brand with which you are acquainted?

A. As to the One Bell brand, yes sir; there you have the book (pointing to page 211) trademark: The representation of a Bell on blue paper appearing on page 212. The witness then points out the date of registry, to-wit, November 3, 1903.

Mr. KINCAID: Until competent and satisfactory proof is produced with reference to this trademark, so that I have some foundation for my objection, I am opposed to the further examination of this witness upon this point. It is necessary that the document be first introduced in evidence so that the witness can testify with reference to it. It is a fundamental rule of evidence and I object to any questions being asked with reference to this document until it has been actually offered in evidence.

The COURT: Objection is overruled. The court will reject the evidence whenever it is attempted to be introduced, upon proper objection. But objections cannot be made in such a general way as this.

Mr. DIOKNO: Do you know whether prior to this date the trademark in question has been registered in the Philippines, I mean prior to 1903 and with reference to this One Bell brand?

A. Yes sir.

Q. Do you have any record in your office with reference to that former registry?

A. Yes sir. Here they are.

112 Q. In this document, the last one presented by you, as well as on this register, page 211, it appears that the trademark has been continuously used in the business of Messrs. Vandenberg & Co. from the year 1836. Do you have any record of this in your office?

Mr. KINCAID: I object to the question. No such thing appears in any authentic manner from that document. I insist that the documents be produced before any such questions are asked and such conclusions drawn, and, secondly, if there is any record of this, that the same be introduced and not the testimony and opinions of the witness.

The COURT: Objection overruled.

The WITNESS: No sir. For the reason that the documents which were in the custody of the Society of Amigos del Pais (Friends of the Country) were all destroyed by fire, and with reference to that trademark you will perhaps find some recent letters from the firm of Badinberg & Co. (Vandenberg). We have no records as far back as that.

The COURT: The hearing of this case is continued to the 11th of April at 11:30 a. m.

I certify that the foregoing is a true and correct transcript of the stenographic notes taken by me in the above-entitled cause.

(Signed) FELIPE A. DE LA CAMARA.

113 Continuation of the Trial.

MANILA, *April* 11, 1907.

Before the Honorable Manuel Araullo.

Present:

W. A. Kincaid, Counsel for Plaintiff.
Messrs. Buencamino and Diokno, Counsel for Defendant.

Testimony of Ernest Appel, a Witness for the Defendant.

Having been first duly sworn, testified as follows:

Mr. DIOKNO: Please state your name, residence and occupation.

A. Ernest Appel, grocery and liquor broker for the firm of C. Heinsen & Co., 152 Rosario, Manila.

Q. Do you know the brand of gin "La Campana" sold by Messrs. Vandenbergh & Co.?

A. Yes sir.

Q. How do you know it?

A. Because the firm of Heinsen & Co. has been importing that brand of Vandenbergh & Co. for a long time.

114 Q. I will show you this document marked "No. 3" for identification, and will ask you whether you know what it is.

A. Yes sir.

Q. What is it?

A. It is the trademark of Van Den Bergh & Co.

Q. How long have Messrs. Van Den Bergh & Co. been using that trademark?

A. I do not know.

Q. About how long?

A. I do not know, but I think that the book there will show.

Q. Since when have Messrs. Heinsen & Co. been importing the gin manufactured by Messrs. Van Den Bergh & Co.?

A. I do not know when the gin was first imported into the Philippines, but the books of the firm will show that shipment of 500 cases of the Bell brand was received here on the 15th of January, 1892.

Q. Of what brand was that gin imported here in 1892?
A. Of this same brand here.
Q. You mean Exhibit "No. 3"?
A. Yes, the One Bell brand.
Q. You mean to say that they have been importing that gin here since then?
A. Yes, but since 1898 very little of it has been sold here and for that reason we have imported but a small quantity of it.

Q. Does the firm of Heinsen & Co. still import this gin of
115 Van Den Bergh & Co.?

A. Yes sir. We have some in stock.

Q. I desire to introduce in evidence these three documents, marked Exhibits "No. 1" and "No. 2," duly identified by Mr. Ubeda when he testified as a witness, and Exhibit "No. 3," also duly identified by the witness now on the stand.

Mr. KINCAID: I object to the admission of Exhibit "3" for the following reasons: First. That plaintiff in this case does not pretend to defeat any right of the trademark alleged to belong to Messrs. Van Den Bergh & Co. To be sure, the trademark of Van Den Bergh & Co. is not valid in the Philippine Islands for the reason that at the time the trademark of the plaintiff was registered here, the trademark of Van Den Bergh & Co. had no right or standing in the Philippines, any right which they may have had having been forfeited. In the third place, instead of settling the question raised between the plaintiff and the defendant in this case, the evidence which is sought to be introduced, Exhibit "No. 3," refers to something foreign to this case or to what is otherwise known in law as res inter allias facta.

Mr. DIOKNO: As Your Honor will see, there is between the trademark of Van Den Bergh & Co. and the one used by the plaintiff a very remarkable similarity,—one is an imitation of the other; it is an actual forgery; our purpose is to show precisely this fact, to-wit, that the trademark used by Mr. Ubeda is a falsification, is an imitation, and as such cannot be protected by law.

116 The COURT: Let Exhibit "3" be admitted in evidence, but the court reserves to itself the right to judge of the materiality and importance of this exhibit, considered together with the other proofs and the pleadings in this case, in discussing the question of law involved.

Mr. KINCAID: With my exception. And in order that my objections may be complete I will ask the court to strike out all that the witness has said with reference to the trademark of Van Den Bergh & Co. for the same reason as advanced by me in support of my objection to the admission of Exhibit "3."

The COURT: Motion overruled.

Mr. KINCAID: With my exception.

Cross-examination by COUNSEL FOR PLAINTIFF:

Mr. KINCAID: How long have you been in Manila?
A. For about three years.

Q. Where have you been all that time?
A. With the firm of Heinsen & Co.
Q. So that you do not know anything about this brand of gin except what you have learned during those three years, do you?
A. Yes.
Q. All the rest you know is merely hearsay, is it not?
A. No, I can tell by the books of the firm.
Q. Yes, from the books, but you have not got them here. What do you know of your own knowledge anyhow?

Mr. DIOKNO: I object to the question for the simple reason that he knows of his own knowledge that the facts are so and
117 so from the books.

The COURT: Objection overruled.
Mr. DIOKNO: Exception.

The WITNESS: I know that they have imported the One Bell brand of Messrs. Van Den Bergh & Co. for our firm, which I myself have sold.
Q. One case?
A. No, more than one.
Q. How many cases?
A. That I cannot say.
Q. More or less, how many during those three years?
A. I have no means of estimating.
Q. Approximately how many?
A. I suppose about seventy cases, maybe one hundred.
Q. How many bottles to a box?
A. Fifteen bottles to a box.
Q. So that you have been able to sell very little of that brand?
A. Yes, very little.
Q. Is this gin manufactured under this trademark in this country?
A. No sir.
Q. Is it imported from Spain? Is it not?
A. From Amberes, Holland.
Q. Are you well acquainted with the gin manufactured by Patricio Ubeda? Are you not?
118 A. Not very well.
Q. You have seen it many times in the market, have you not?
A. Yes sir.
Q. And for that reason, as I can see, you know it pretty well, do you not?
A. Yes sir.
Q. You know that during those three years the gin manufactured by Patricio Ubeda has been widely known in this country, do you not?
A. I think so.
Q. Much more than yours?
A. Yes sir.

Q. As a matter of fact your gin has become almost unknown in this country, has it not?

A. Yes.

Mr. DIOKNO: Do you know whether Mr. Ubeda knew that you were selling that brand of gin?

A. Maybe he did.

Q. Do you know whether he actually knew it or not?

A. I cannot say whether he actually knew it or not.

Q. Do you know whether he knew that you were selling that brand of gin?

A. I do not know. Maybe he did and maybe he did not.

Q. Have any of you informed Mr. Ubeda that you were selling this gin with the trademark introduced here in evidence?

A. I think not.

119 Q. Did you send word to Mr. Ubeda, advising him that if he wanted to sell any of this gin manufactured by Messrs. Van Den Bergh & Co. he should notify you?

A. I think not.

Q. Then if he knew it, it must have been because of the few cases sold by you?

A. It may be.

Redirect examination:

Mr. DIOKNO: Have you any knowledge of a letter which was written by the firm of Van Den Bergh & Co. to Mr. Ubeda or to Messrs. Legarda & Co. with reference to this Three Bells or One Bell brand?

A. Yes, we have a copy of it.

Q. The copy to which you refer, is this the one here which I now show you for identification, numbered 4 and 5?

A. Yes sir.

Q. Where are the originals of these letters?

A. I do not know. Maybe they are with Messrs. Van Den Bergh & Co.

Q. Where?

A. At Amberes.

Q. How do these copies come to be in your possession?

A. Messrs. Van Den Bergh & Co. sent them to us.

Q. When did you get those copies?

A. I do not know the date.

Q. About when?

120 A. I cannot say.

Q. I now introduce these Exhibits, 4 and 5, in evidence as a part of the witness' testimony.

Mr. KINCAID: I object to the admission of those letters because they are mere copies. It seems that the originals are still in existence and their whereabouts has not been explained. To my mind those letters are of very little importance in this case.

The COURT: Let the documents be admitted in evidence, the court reserving the right to take them into consideration in connection with the other facts of the case.

Mr. KINCAID: With my exception.

Mr. DIOKNO: I now introduce in evidence this document and ask that the same be marked for identification defendant's Exhibit "No. 6." This document refers to the burning of the building occupied by the society known as Amigos del Pais (Friends of the Country), for which reason we are now unable to introduce in evidence the original certificate of the trademark used by Messrs. Van Den Bergh & Co. during Spanish sovereignty.

Mr. DIOKNO: I now offer to introduce in evidence Exhibit "No. 6."

Mr. KINCAID: I object to the admission of this document as immaterial, it having no bearing upon any issue of the case. It does not appear to be the proceedings had in accordance with any law or regulations, as far as I know. It is an ex parte proceed-
121 ings without any legal value and it cannot prejudice third parties.

Mr. DIOKNO: Our object in introducing this document is to prove that we are now unable to submit to the court the original proceedings instituted by the owners of the trademark, Messrs. Van Den Bergh & Co., for the reason that the papers were burned during the fire to which this document refers. This document further shows that all the records kept at the said building referring to trademarks were also burned.

The COURT: I will postpone the admission of this document until the others are offered in evidence.

Mr. KINCAID: I desire to call the court's attention to the impossibility of what counsel for the other side says.

Mr. DIOKNO: We also offer in evidence this document, numbered "7" for identification. It is a petition for the registration of a trademark, presented by Vicente Trius, which petition was denied precisely because the archives of the association known as Amigos del Pais (Friends of the Country) had been burned and it was necessary to refer the matter to the authorities in Spain.

Mr. KINCAID: I object, as wholly immaterial.

The COURT: Let Exhibits Nos. "6" and "7" be admitted in evidence, the court reserving the right to consider the same in connection with the other evidence in the record.

Mr. KINCAID: With my exception.

Mr. DIOKNO: I now introduce this document, marked
122 "No. 8" for identification, which is a certified copy of the title of ownership of the trademark in question issued in favor of Messrs. Van Den Bergh & Co. for Spain and her insular possessions.

Mr. KINCAID: I object to the admission of this certificate for the following reasons: First, that it does not appear that it was registered in the Philippine Islands, which was a necessary requisite, notwithstanding that the grant referred to Spain and its colonies, such registration being necessary in order that it could have any effect in the Philippines; and, secondly, because the trademark in question had lapsed on the date of the petition and grant to the

plaintiff in this case now attached to the record, the date of the decree signed by José Morer being 1873.

The COURT: Let the document be admitted in evidence, the court reserving the right to take into consideration the objection of counsel for plaintiff on the ground that the right to use the trademark in question had been forfeited at the time plaintiff registered his own trademark in these Islands.

Mr. KINCAID: With my exception.

Mr. DIOKNO: I offer this document in evidence and ask that it be marked defendant's Exhibit No. "9," the same being the record of the registration in the United States of the trademark of Van Den Bergh & Co. with reference to the One Bell brand, the said record being on file in the Division of Patents, it being duly certified to by the chief of the said division.

123 Mr. KINCAID: If the other document offered in evidence was absolutely immaterial, this is all the more so. I object to the admission of this document for the reason, first, that it is absolutely immaterial, and secondly, because a trademark registered in the United States under the laws of that country on a date prior to our relations with the Philippine Islands could not have given to any person the right to use that trademark in the Philippines. Another reason is that the authenticity of this document does not appear from this certificate signed by the Chief of Archives of Manila, and under the law in force and in view of the previous grant of the title of this trademark to the plaintiff in this case he, the Chief of Archives, cannot have the legal custody of this document and has absolutely no power to issue certified copies of the same. A further reason is that no trademark registered in the United States prior to the change of sovereignty could in no way infringe upon or affect a similar trademark used in the Philippines for the reason that the protection of the same had been guaranteed by the Treaty of Paris.

The COURT: Let Exhibit "9" be admitted in evidence, the court reserving the right to consider the importance and relevancy of the same in connection with the other facts in the case.

Mr. DIOKNO: I also offer in evidence this document, marked for identification No. "10," which is a record of certain proceedings duly recorded in accordance with law.

124 Mr. KINCAID: I object to the admission of this document No. "10" for the reason that it appears to be a certificate of the registration of a trademark in Genoa referring to alcohol and spirits of all kinds, the registration of which was noted by the bureau in question on the 3rd of November, 1903; for the following reasons: First, because the document is absolutely irrelevant since the defendant in this case does not derive or take any right from and under that registration. Secondly, because it deals with a matter entirely foreign to this case; and, thirdly, because this trademark or rather this registration is of no value; it refers to the very law which proves its invalidity by attempting to conform to it.

The COURT: Let the document be admitted in evidence with the same reservation as the others.

Mr. KINCAID: With my exception.

Mr. DIOKNO: We are also going to offer in evidence this book, on pages 42 and 43 of which appears a decision of the Court of First Instance of the City of Madrid in favor of the trademark of Van Den Bergh & Co., which said decision was subsequently affirmed by Part II of the Supreme Court of Spain. This for the purpose of showing to this court that at the time that judgment was rendered in 1893 the trademark in question was still in force. I ask that the same be marked Exhibit "11."

Mr. KINCAID: I object to its admission for the following reasons: Because it is a private book printed by Messrs. Van Den Bergh & Co. themselves. This will be sufficient to dispose of this question.

Secondly (Mr. Diokno says that this book is on file in the
125 Bureau of Archives) because, even assuming that such a decision was rendered by the courts in question, it cannot have any legal effect in the Philippine Islands for the reason that the trademark was not registered in the Philippine Islands and as to these Islands the grant had become void and of no effect. The decision in question would simply go to show that it had not become so void in Spain. I presume that they renewed the registration there.

Mr. DIOKNO: Later on we will offer in evidence an international treaty which will show that such trademarks never become void.

The COURT: Admitted in evidence. The same ruling as before. Exhibit "11."

Mr. KINCAID: With my exception.

Mr. DIOKNO: Finally, we offer in evidence this document and ask that the same be marked Exhibit "12," the same being a copy of the registry of the trademark Three Bells used by Mr. Ubeda, for the purpose of showing to the court that he had the same registered as an importer and not as a manufacturer. Exhibit No. "12."

Mr. KINCAID: I object to the admission of this exhibit for the reason that the original is already on file, the same being the best evidence.

The COURT: But that would not prevent the defendant from introducing a copy of the same document (with some other purpose) and the document is admitted in evidence and let it be marked Exhibit "12."

126 Mr. DIOKNO: We will also ask the court that the record show that the "papel de reintegro" attached to plaintiff's title does not bear the signature of the official in charge nor the rubric and seal of the proper office, as required by law.

Mr. KINCAID: I object to the court ordering that the record show any such fact until it comes to pass upon the facts.

The COURT: The court has already had before it the so-called "papel de reintegro", the same as the assessors, and the court can take into consideration anything that appears in or has been omitted from the same.

Testimony of Manuel Iriarte, Recalled as a Witness.

Mr. DIOKNO: I will now show you Exhibit "3" and the label pinned onto the first page of Exhibit "A" and will ask you to state if you are familiar with both trademarks.

A. Yes sir.

Q. Are you, by reason of your office, required to see whether there is any similarity between trademarks, and if so, please state whether the trademark pinned onto the first page of Exhibit "A" and the one marked Exhibit "3" are similar or not?

Mr. KINCAID: I object to the evidence. We know what the duties of this gentleman are. The law specifies it. And we know what his opinion is with reference to the facts of the case as they appear from the documents in so far as may be necessary to prove that
127 opinion. It is not competent for this witness to come here and decide the case for the court and assessors. This would be the same as the Supreme Court calling on this gentleman here in some case on appeal and telling him that the court, in compliance with its duties, had decided this very question in this or that way.

The COURT: Really, it is not necessary that the witness should testify upon this point because the trademark, Exhibit "3", and the label which is pinned onto Exhibit "A" may be viewed by the court, and as to the similarity between the two trademarks any person could give testimony contrary to the opinion of the Chief of the Bureau of Archives. The question in its present form cannot be allowed.

Mr. DIOKNO: I withdraw the question.

—. Please state to the court the facts by virtue of which this trademark, Exhibit "3", was registered in November, 1903, there being an entry in one of the books relating to the trade-mark attached to Exhibit "A"?

Mr. KINCAID: I object. Those facts can only appear from the petition which the law requires to be presented and which we have right here. This gentleman made the registration and he cannot know any other facts.

The COURT: That question is rather indefinite. We do not know whether counsel refers to the facts that were taken into consideration by the Bureau of Archives for the registration of the trademark or the facts which were relied upon by the petitioner or the facts which were relied upon by the petitioner or the facts which appeared from the proceedings relating to the registration of the trademark.
128 The question in its present form cannot be allowed for the reason that it is vague and indefinite.

Mr. DIOKNO: With my exception.

I now offer in evidence this entry, No. "8."

Mr. KINCAID: I object to the admission in evidence of any book from that Bureau. The law requires that a certified copy be furnished of anything you want to bring here: I make this objection for the purpose of saving time because I know that they have already

taken out of that book certified copies of all papers having any bearing on this case.

The COURT: That evidence may be offered either by the introduction of the original document and examining the witness with reference to the original document, or by first offering the original document and then furnishing a certified copy of the same, and this, I think, is what counsel for defendant intends to do. He has first offered in evidence the original document and it may be that he has a certified copy ready to be filed. The objection is overruled.

Mr. KINCAID: With my exception.

Mr. DIOKNO: I will show you this entry No. "8" appearing on the registry of trademarks and will ask you whether there is any other record in your office of this registry?

A. No sir.

The COURT: What page is it?

Mr. DIOKNO: Page 3 of the registry book. The entry offered in evidence is the same which appears on Exhibit "12." Was
129 that entry lawfully made? I withdraw the question. Do you find any legal defect in that entry?

Mr. KINCAID: I object to the question as calling for the opinion of the witness. I object to the question because it simply calls for the opinion of the witness as to legal defects.

The COURT: Objection is overruled.

Mr. KINCAID: With my exception.

The WITNESS: I think I have already answered this question, when I said that there is no record of it, that I had been unable to find any record of it.

Mr. DIOKNO: Please explain to the court why your answer that there is no record in your office of this is also an answer to the question whether there is any defect in the registration of the trademark in question.

Mr. KINCAID: I object to the question as absolutely incompetent.

The COURT: Objection sustained.

Mr. DIOKNO: With my exception.

Q. Did that entry No. "8" appear in the book at the time this trademark, Exhibit "3," was registered?

Mr. KINCAID: I object to the question.

The COURT: Objection overruled.

A. What trademark?

Q. That of Van Den Bergh & Co.

A. The One Bell brand, yes.

Q. At the time this trademark, Exhibit "3," relating to
130 the Bell brand of gin manufactured by Messrs. Van Den Bergh & Co. was registered, did entry No. "8," which I now show you, referring to the registration of the Three Bells brand of gin of Patricio Ubeda, already exist in that book?

A. Yes sir.

Q. Why did you register ——

Mr. KINCAID: I object to the question.

Mr. DIOKNO (finishing the question asked by him before Mr. Kincaid objected): —this Three Bell brand of gin of Messrs. Van Den Bergh & Co. when there already existed in your books an entry with reference to another similar brand?

Mr. KINCAID: I object to the question as incompetent. The reason is immaterial as long as it does not appear in the document itself.

The COURT: Objection overruled.

Mr. KINCAID: With my exception.

A. Because the trademark of Van Den Bergh & Co. was already registered in the United States when I took charge of the office. Captain Ahern admitted that trademark which came from the United States, that is to say, a certified copy of the registered trademark in the United States.

Mr. KINCAID: I ask the court to strike out the witness' answer; also the question asked by counsel for the other side, because the witness is simply stating the reasons which somebody else had for so doing. It may be that he is mistaken. It was not his own act.

131 The COURT: The witness has testified with reference to acts done by him. He has said that he registered the trademark known as Three Bells, notwithstanding the fact that the trademark, Exhibit "3," had already been registered, for the reason that the patent issued in the United States to Messrs. Van Den Bergh & Co. was received here, and all these facts appear from the records of the office of which the witness is chief, and he is testifying with reference to facts which appear from documents in his own custody.

Q. Did you take into consideration the entry relating to the registration of this Three Bells brand of gin when you registered the trademark, Exhibit "3," of Messrs. Van Den Bergh & Co.?

Mr. KINCAID: I object for the same reason. It is absolutely incompetent.

The COURT: Objection overruled.

Mr. KINCAID: With my exception.

A. No sir, because I did not have the record before me.

Cross-examination by COUNSEL FOR PLAINTIFF:

Mr. KINCAID: Now, Mr. Iriarte, that we have gone into this question, please state to this court how it is that the absence of the record brought about the registration of the trademark, Exhibit "3," how the absence of the record relating to the trademark of Patricio Ubeda caused the registration of this trademark, Exhibit "3"?

132 A. In the first place, because in 1900, when I had not as yet taken charge of the office, my predecessor had admitted a trademark which had been registered in the United States, and, it having been admitted by him, of course, the trademark was entitled to protection here under an order of the Bureau of Insular

Affairs and Customs in Washington. When I took charge of the office that other petition was presented for the registration of the same trademark under a new Act of the Philippine Commission. I, in view of the fact that it had already been filed and because we could not find an entry relating to the Three Bells brand of Mr. Ubeda——

Mr. KINCAID: Yes, and therefore you could not see any similarity between that trademark and the one marked Exhibit "3"?

A. I did not take into consideration the Three Bells brand.

Mr. KINCAID: You mean the similarity between the two when the second trademark was registered, do you not?

A. Yes sir.

Mr. KINCAID: Exactly. When it was filed there when Captain Ahern was in charge, prior to the enactment of that law by the Philippine Commission, you were unable to find that entry in the registry relating to the mark of Patricio Ubeda, is that it?

A. Perhaps, I cannot say positively.

Q. At least there was no record on file and it may be that the second trademark was admitted because he did not know the nature and effect of the trademark of Mr. Ubeda because he did
133 not have the record before him?

A. I do not know.

Q. You know that all those defects existed there and because of the absence of the record you were unable to determine the nature and effect, also the similarity to the other trademark, unless you could go to the record and get a copy of the same?

A. We could not take Mr. Ubeda's trademark into consideration by reference to the registered label only. We did not know whether it was registered or not.

AGAPITO ZIALCITA recalled as a witness for the defence.

Mr. DIOKNO: Are you the defendant in this cause?

A. Yes sir.

Q. Do you know these labels which appear on Exhibit "C" and on the square-faced bottle Exhibit "C"?

A. Yes sir.

Q. Have you ever used this label?

A. Yes sir.

Q. Since when and until when?

A. From the month of July to the month of December. I think I have already testified as to this. I do not remember exactly.

The COURT: Of what year?

A. 1905.

Q. Are you still using that trademark?
134 A. No sir.

Q. When did you stop using it?

A. Since that date I stopped using it.

Q. From whom did you acquire the trademark in question?

A. From the Chinaman Limiao Sim.

Q. How did you acquire it?

A. Under an agreement with him that I was to use that trade-

mark for a certain time, and if I liked it I could keep it forever.

Q. Please look at this seal which appears on the square-faced bottle, Exhibit "C," and state whether you have used that seal

A. Yes sir, I have used it.

Q. Since when?

A. I do not remember exactly but I used it.

Q. When you first used this trademark known as the Two Bells of Gabino Barreto, was the seal on it or not?

A. No sir.

Q. Then you used the seal some time after you had been using the trademark, is that it?

A. Yes sir.

Q. How long after?

A. I do not remember.

Q. Please look at this brand, which is known as the Three Bells of Mr. Patricio Ubeda, as it appears from Exhibit "E," and state whether you are familiar with this trademark and the seal which appears on it.

135 A. Yes sir, I am.

Q. When you first used this label, Exhibit "C," and your seal, did you try to imitate this other one here?

A. No sir, by no means. I can further explain, if necessary.

Q. All right.

A. I used that seal expressly for the purpose of distinguishing my brand from the others. All the labels bear the number of the paragraph and the classification number, which is one of the means of identification, outside of the seal, and I put mine within the seal to distinguish it from the others.

Q. Please look at this square-faced bottle marked Exhibit "E" and state whether these letters A and the figures 1 and 2 are the ones to which you refer as appearing between the trademark and the seal.

A. Yes sir.

Q. I will now show you plaintiff's Exhibit "B," which is a letter addressed by you to Patricio Ubeda, and will ask you to state whether you have done anything in conformity with that letter.

A. Nothing. After I wrote this letter I again wrote to Mr. Ubeda, requesting him to show me some convincing proof of the fact that his trademark was registered. It was my intention not to hurt anybody else's business and accordingly I went to the registry of trademarks for the purpose of ascertaining whether Mr.

136 Ubeda's trademark was legally registered, and the director of trademarks told me that the said trademark——

Mr. KINCAID: You need not say what the director told you.

Mr. DIOKNO: I insist that the witness be permitted to say what he was told for the purpose of showing what his intention was.

The COURT: Well, let the witness proceed.

The WITNESS: The director told me that he could not say whether or not the said trademark was registered because the record relating thereto was not on file in the archives, adding that if it had been registered at all, it had been illegally registered.

The COURT: That is all hearsay, because you are simply repeating what the director told you. Let the answer be stricken out because the statement was not made by the director in the presence of the plaintiff.

Mr. DIOKNO: With our exception.

The WITNESS (continuing): —Then, after this, believing that my trademark known as Two Bells might be also considered illegal, what I did was to tell the Chinaman that I did not care to use his trademark any more and that I would return it to him because it did not suit me. And then, about that time, Mr. Ubeda filed this suit against me.

Q. You needed that trademark in your business, did you not? I mean the trademark used by Gabino Barreto?

Mr. KINCAID: I object. We are not going to measure this matter by the opinion of the witness as to his needs.

137 Q. Do you sell gin now?

A. Yes sir.

Q. Without that trademark?

A. Without that trademark.

Q. Which is the trademark that you now use?

A. "La Copa."

Q. And how much of that brand have you sold, more or less, since you stopped using the trademark of Gabino Barreto?

Mr. KINCAID: I object for the reason that it is absolutely immaterial.

The COURT: Objection overruled.

A. Well, about five thousand liters a month.

Q. And how much gin of the Two Bells brand of Gabino Barreto have you sold?

A. I have already answered that question.

Q. You testified as to the number of cases, but I want to know how many liters for the purpose of making a comparison.

A. I think it was about six hundred liters a month, at the most.

Q. When you used that trademark, did you have any intention of thereby defrauding the owner of the other trademark known as the Three Bells, Mr. Patricio Ubeda?

A. No sir.

Q. When you used that seal, did you use it with the intention of imitating the seal used by Patricio Ubeda?

A. I have already said that I did not have any such in-

138 tention, because my only object in using that seal was to distinguish my product from others bearing the internal revenue letters and figures outside of the seal.

Q. Were your liquors ever analyzed in 1900?

A. Yes sir.

Q. Who analyzed them?

Mr. KINCAID: I object to the question. What has that got to do with this case?

The COURT: It may be that it is a preliminary question as to the quality of the article, that is, whether it was good or not.

The WITNESS: In 1900 they were analyzed by Eduardo Ters and they were accepted, whereas the others were not. Since that date my sales have increased to the extent that at the present time I have four hundred retail stores in Manila which I supply and my products have been awarded prizes by the National Philippine Exhibition and by the St. Louis Exposition.

Mr. KINCAID: I ask the court to strike all that out as immaterial.

The COURT: The latter part of the witness' answer is connected with the first part of the same wherein he said that in 1900 his products were not rejected as being of bad quality.

Mr. KINCAID: With my exception.

Q. Do you know whether that same analysis was made of the liquors sold by Mr. Ubeda?

A. Yes sir.

Q. Do you know whether Mr. Ubeda's factory was closed?

139 A. Yes sir.

Q. When was it, before or after the analysis?

A. After the analysis of the products of the various distilleries in town.

Q. Have you made any investigation as to the legality of the registry of the Three Bells brand?

A. Yes sir.

Mr. KINCAID: I object to the question as incompetent and immaterial. That is exactly what we are trying to ascertain now. He has already testified to that.

The COURT: Objection overruled.

Mr. KINCAID: With my exception.

The WITNESS: Yes sir.

Q. What did you personally find out as a result of those investigations made by you?

Mr. KINCAID: I object to the question as scandalous.

Mr. DIOKNO: What was the result of your investigations?

Mr. KINCAID: I object to the question.

The WITNESS: I went to the office of the Internal Revenue Bureau and asked permission to see the books in which the various brands of Mr. Ubeda appeared, and there I saw that the aniseed brand known as "Peresoso" was the same as the "Monkey" brand; his whiskey was the same as another brand I saw there, and so on; the One Bell brand was the same as the Three Bells brand. I got such a bad impression from this that I immediately went to my house and decided to pay no further attention to Mr. Ubeda.

140 Mr. KINCAID: I ask the court to strike out the whole answer of the witness as immaterial and scandalous. The witness is apparently testifying as to the contents of books kept by

the register of trademarks when as a matter of fact a certified copy of the matters appearing on the said books, under the seal and signature of the person in charge, would be the only competent evidence, the witness bringing into this case by his testimony alleged discoveries which are absolutely foreign to the issue.

The COURT: I am going to sustain that objection. The objection is sustained because what the witness has said has nothing to do with the third proposition set out in his answer, which only refers to the use by the plaintiff of a simulated trademark, that is to say, the trademark of Messrs. Van Den Bergh & Co., for the purpose of defrauding the public, but the answer says nothing about aniseeds or the "Monkey" brand or any other liquors.

Q. We except to the ruling of the court and offer to prove by the testimony of this witness the allegations contained in paragraph III of our answer.

The COURT: Objection sustained and let that be stricken out from the record.

Mr. DIOKNO: After making those investigations did you continue using the trademark of Gabino Barreto?

A. I stopped using that trademark as a result of my investigations. Some time intervened, however, but I finally stopped
141 using it.

Q. About when did you stop using that trademark? Was it about the time that the military government closed plaintiff's distillery?

A. In 1900.

Q. Do you know when he again resumed the manufacture of his liquors?

A. Well, I think it was in 1900. I do not remember but I think it was some time in 1902, I believe.

Q. Was it after his distillery had been closed by the military government when his gin of the Three Bells brand again appeared on the market?

Mr. KINCAID: I object to the question. No one has said that the military government stopped the use of the trademark in question.

Mr. DIOKNO: I will withdraw the question and will ask the witness if in 1900 this trademark, Three Bells, of Patricio Ubeda, was used in the market.

A. That is a very recent trademark. I believe that in 1904 he commenced to use it.

Q. You refer to the label appearing on Exhibit "E"?

A. Yes sir.

Q. With the serrated edge and the design embossed?

A. Yes, design embossed and gilt bell.

Q. Please look at this tassel attached to Exhibit "E" and state to the court whether Mr. Ubeda's gin is sold in the market with that tassel on the bottles.

142 A. Yes sir.

Q. How long since?

A. Since I have known Mr. Ubeda's brand.

Q. And how long have you known that brand?

A. I only knew of its existence when I got the Two Bells brand from Gabino Barreto.

Q. When did you first become acquainted with the Two Bells brand?

A. Several years before I secured that trademark.

Q. And what trademark was used by Mr. Ubeda prior to 1904?

A. In 1904? You mean a trademark prior to 1904? Well, I do not remember when he used it. The other trademark, I do not remember how long he has been using it, but I do remember that Mr. Ubeda changed his trademark in 1904 only; he had a *a* trademark similar to this.

Q. And this trademark here (pointing out to the witness the label pinned onto the first page of Exhibit "A")?

A. Yes sir.

Cross-examination by COUNSEL FOR PLAINTIFF:

Mr. KINCAID: How many liters are contained in a case of that wine?

A. It must contain about twenty-two liters.

Q. You have said that Mr. Ubeda's trademark is very recent?

A. Yes, that particular brand.

143 Q. You mean Mr. Ubeda's brand?

A. The one that appears in the exhibits.

Q. The Three Bells brand.

A. Yes sir.

Q. And you say that it is very recent?

A. Yes sir.

Mr. DIOKNO: He means the one that appears on Exhibit "E".

Mr. KINCAID: Do you remember what the newspapers said in 1902?

A. No sir.

Q. Don't you know that his article was advertised in all the newspapers that year and that all the lawyers in town and everybody in the country knew this trademark through the Spanish and Filipino newspapers? Don't you remember that? Don't you know anything about it?

A. No sir.

Q. You have not noticed anything of Mr. Ubeda's?

A. Yes, I have but it was not that brand; it was some other brand.

Q. I wish to know whether you want to intimate to the court that you have not seen this trademark bearing the representation of Three Bells until recently?

A. This trademark as it now appears, yes sir.

Q. The trademark as it now appears.

A. This trademark as it now appears I have only seen it since 1904. I mean the trademark which appears on that exhibit (pointing to Exhibit "D").

144 Q. Have you got your mind on some small detail which in your opinion serves to distinguish the one from the other or

do you mean to say that you have not substantially seen that trademark of the Three Bells until recently, which is it?

A. The previous trademark is different from the one now used, it is somewhat different.

Q. So that you did not mean to tell the court that the Three Bells brand is a recent one, but that some details that you noticed on it are recent, is that it?

A. The name Three Bells is not recent but otherwise the brand is.

Q. Please state to the court what part of the trademark is recent.

A. This one here has a serrated edge and is embossed (pointing to the label on the square-faced bottle marked Exhibit "D"); it has a serrated edge and it is embossed; the other one has a plain edge and is not embossed.

Q. You mean to say that this label which is attached with a pin to Exhibit "A" is recent?

A. No, I have seen that one since 1902, as well as the other brand of the Two Bells.

Q. And prior to 1902?

A. No sir.

Q. But which is it? I wish you would be careful in your statements.

A. This is embossed and has a gilt bell and then a ser-
145 rated edge.

Q. And in your opinion that is enough to distinguish one trademark from another, and say that it is a different trademark, is it?

Mr. DIOKNO: I object to the question. It should be confined to questions of fact.

The COURT: Objection overruled.

Mr. DIOKNO: Exception.

The WITNESS: I drink and I am a drinker; I do not say whether or not the trademark is the same because I do not know, but I cannot be deceived by the use of a different trademark or some slight difference in the trademark. The habitual drinkers know what they drink.

Q. And do you think that all habitual drinkers are like you in that particular?

A. I do not know about others, but we distillers, being in the business, can tell right away any difference or change in a trademark, and this is the reason why I particularly noticed that Mr. Ubeda's distillery——

Mr. KINCAID: Then you refer to the distiller or manufacturer and not to the consumer?

A. Well, I think that the consumer cannot be deceived by the whiskey or any other liquor which he may drink.

Q. You have testified as to the condemnation of the distillery of Mr. Ubeda by the military authorities?

A. Yes sir.

Q. How do you know that?

146 A. Because my agents, who sell liquors and alcohols to Mr. Ubeda, as well as to other persons, informed me that they had not only closed two or three distilleries, but that they had even thrown away the products manufactured by them, and this is a matter of common knowledge in Manila.

Q. And is that all you know about the matter?

A. Yes sir.

Q. I ask the court to strike out all that the witness has said with reference to what the military authorities did with Mr. Ubeda's wine, it being purely hearsay.

Mr. DIOKNO: The witness has said that it is a matter of common knowledge.

The COURT: Let it be stricken out, because that testimony is absolutely worthless. He might just as well have said that the distillery of Messrs. Inchausti was closed.

Mr. DIOKNO: With my exception.

The COURT: Defendant is given fifteen days from tomorrow within which to file his argument, and plaintiff may answer within an equal period.

Counsel for defendant asked the court to be relieved from the necessity of filing with the clerk, to be attached to the record, a specimen of the seal which appears on Exhibit "C", for the reason that there is none available now.

Mr. Kincaid agreed to this petition of counsel.

I certify that the foregoing is a true and correct transcript of the stenographic notes taken by me in the above-entitled case.

147 FELIPE A. DE LA CAMARA,
Official Stenographer.

148 PLAINTIFF'S EXHIBIT "A."

The Governor-General and Captain-General of the Philippine Islands.

Whereas Patricio Ubeda Gallego, a resident of Manila, has shown in due form, upon investigation, that he is the sole owner of the attached trademark on the wines imported by him, known as the "Tres Campanas."

Now Therefore, by virtue of the provisions of the regulations now in force with reference to trademarks, I hereby issue to him this title of ownership entitling him to all the benefits therein set out from the 24th day of October of the present year, the date on which his petition was registered in the General Registry, together with the aforesaid trademark, and he may prosecute in the Courts of Justice who ever should attempt to usurp or otherwise falsify his said trademark.

This title shall be attested by the Director of Civil Administration, and the necessary notation will be made by the Bureau of

Agriculture, Industry and Commerce, without which requisites it shall be of no force and effect.

Given at Manila this 15th day of December, 1898.

THE GOVERNOR-GENERAL,
(Signed) FRANCISCO RIGGO.

THE DIRECTOR-GENERAL.
(Signature illegible.)

149 Title of ownership of a trademark issued in favor of Patricio Ubeda.

Indorsed: Contents noted by the Bureau of Agriculture, Industry and Commerce under No. 8, page 3, Registry Book No. 2 of Industrial and Commercial Trademarks.

Manila, December 24, 1898.

(Signed) ANTONIO ESCARTIN GARCIA.

There is attached to this exhibit the label bearing the trademark in question.

150 I, Candido Cabello Y Echenique, Chief of Administration of Third Class, Assistant Director and Disbursing Officer for the General Direction of Civil Administration of the Philippine Islands,

Do hereby certify: That on the 24th day of the present month, at nine o'clock a. m., there was filed in this office by Patricio Ubeda Gallego a petition of the following tenor:

"To His Excellency, the Director-General of Civil Administration.

Patricio Ubeda Gallego, a merchant, of age, with certificate of registration, respectfully states:—That desiring to register in the Registry of Trademarks of this General Direction of Civil Administration a trademark of his own, designated "Tres Campanas," and of which he begs to enclose the six copies which the law requires, he respectfully petitions Your Excellency to grant his request after the proceedings provided for by the present laws and regulations on the subject have been first had.

"This is a boon which your petitioner no doubt will obtain from the recognized goodness of Your Excellency, whose life God may preserve for many years.

"Manila, October 22, 1898.

(Signed) PATRICIO UBEDA."

151 And pursuant to the provisions of Section 26 of the regulations governing trademarks, issued by the Secretary of the Colonies on the 26th of October, 1888, I issue these presents at the request of the party in interest, duly vised by His Excellency, The Director-General, at Manila, this 25th day of October, 1898.

(Signed) CANDIDO CABELLO.

Vised:

THE DIRECTOR-GENERAL.
(Signature illegible.)

There is attached to this document a specimen of the trademark, "Tres Campanas," of Patricio Ubeda.

152 There are attached to the two preceding documents five sheets of the so-called "papel de reintegro," which are as follows:

"Series H. 5 Pesos. Philippine Currency. 1898 & 99 No. 0.0066559

"No. 1.

"Seal: Payments to the Government.
Good for 1898-99.
5 Pesos.

"Part that should be delivered to the payor.
"In payment of the fees for the trademark 'Tres Campanas.'
"Manila, December 24, 1898."
(Not signed.)

"Series H. 5 Pesos. Philippine Currency. 1898 & 99 No. 0.0066560

"No. 2.

"Seal: Payments to the Government.
Good for 1898-99.
5 Pesos.

"Part that should be delivered to the payor.
"In payment of the fees for the trademark 'Tres Campanas.'
"Manila, December 24, 1898."
(Not signed.)

"Series G. 1 Peso. Philippine Currency. 1898 & 99 No. 0.022818

"No. 3.

"Seal: Payments to the Government.
Good for 1898-99.
One Peso.

"Part that should be delivered to the payor.
153 "In payment of the fees for the trademark 'Tres Campanas.'
"Manila, December 24, 1898."
(Not signed.)

"Series G. 1 Peso. Philippine Currency. 1898 & 99 No. 0.22815.

"Seal. Payments to the Government.
Good for 1898-99.
One Peso.

"Part that should be delivered to the payor.
"In payment of the fees for the trademark 'Tres Campanas.'
"Manila, December 24, 1898."
(Not signed.)

"Series F. 50 Cents. Philippine Currency. 1898 & 99 No. 0.019504

"Seal. Payments to the Government.
Good for 1898-99.
Fifty Cents.

"Part that should be delivered to the payor.
"In payment of the fees for the trademark 'Tres Campanas.'
"Manila, December 24, 1898."
(Not signed.)

Then follows a letter written by the Director-General of Civil Administration to Mr. Ubeda, which is as follows:

154 "Office of the Director-General of Civil Administration of the Philippine Islands.

"By virtue of a resolution dated the 5th instant, and upon consideration of the report of the Royal Society, and in conformity with the provisions of Section 27 of the Regulations of October 29, 1888, the undersigned has seen fit to grant to you the title of ownership of the attached trademark 'Tres Campanas,' to be used on the wines imported by you, upon payment of the necessary fees. All of which I take the pleasure to communicate to you for your information and guidance.

"May God preserve your life for many years.
"Manila, December 12, 1898.
"(Signature illegible.)"

Then follows a specimen of Patricio Ubeda's trademark, "Tres Campanas."

"To Mr. Patricio Ubeda."

Exhibit "D"

ESTADOS UNIDOS DE AMERICA.

ISLAS FILIPINAS.

JUZGADO DE PRIMERA INSTANCIA DE MANILA.

Patricio Ubeda
contra
Agapito Zialcita. No. 4233

Certifico que las etiquetas precedentes, son idénticas á las que aparecen estampadas en el frasco Exhibit "D" del asunto arriba titulado.

Manila, 1º de Marzo de 1907.

Pedro de Torres
Escribano Auxiliar
Juzgado de 1a Instancia
Manila, P. I.

155 PLAINTIFF'S EXHIBIT "B."

MANILA, *August* 1, 1905.

Mr. Patricio Ubeda, Manila.

MY DEAR SIR: It is true that I have purchased the gin trademark known as "Dos Campanas" in the belief that in using the same I did not prejudice anybody, but, in view of your claims, I have no objection in losing the amount which I paid for the said trademark, provided you will be kind enough to convince me that your trademark is duly registered, because mine is not registered.

I sell so little of the "Tres Campanas" brand, due perhaps to the fact that the former owner turned out every inferior gin, that I would even consider it an advantage if I could change the same for another brand.

Yours truly,

(Signed) A. ZIALCITA.

(Here follow labels marked page 156.)

157 PLAINTIFF'S EXHIBIT "D."

THE UNITED STATES OF AMERICA,
Philippine Islands:

Court of First Instance of the City of Manila.

No. 4233.

PATRICIO UBEDA
versus
AGAPITO ZIALCITA.

I certify that the foregoing labels are identical with those appearing on Exhibit "D," which is a square-faced bottle introduced in evidence in the above-entitled cause.

Manila, March 1, 1907.

(Signed) PEDRO DE TORRES,
Assistant Clerk Court of First Instance, Manila, P. I.

(Here follow labels marked page 158.)

E X H I B I T "E"

ESTADOS UNIDOS DE AMERICA,

ISLAS FILIPINAS.

En el Juzgado de primera instancia de Manila.

P A T R I C I O U B E D A
contra
A G A P I T O Z I A L C I T A.

Num. 4233.

Certifico: que las etiquetas precedentes, son identicas a las que aparecen estampadas en el frasco Exhibit "E" del asunto arriba titulado.

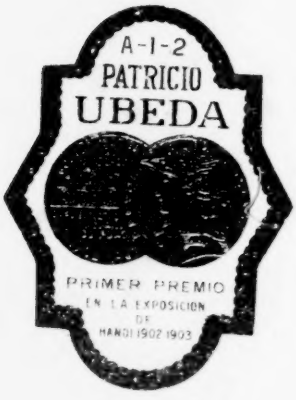
Manila 1º de Marzo de 1907.

Pedro de Torres.

Escribano Auxiliar
Juzgado de 1a Instancia
Manila, P. I.

Para evitar la falsificacion nuestras etiquetas se hallan depositadas en esta oficina
GINEBRA DE TRES CAMPANAS
EXTRA SUPERIOR
PATRICIO UBEDA
MANILA

GINEBRA LOCOMOTORA
MARCA REGISTRADA
PATRICIO UBEDA MANILA


A-1-2
PATRICIO
UBEDA
PRIMER PREMIO
EN LA EXPOSICION
DE
HANOI 1902 1903

GINEBRA LOCOMOTORA
MARCA REGISTRADA
PATRICIO UBEDA MANILA
AVISO A MIS FAVORECEDORES
Con el fin de evitar imitaciones, desde esta fecha llevará mi Ginebra la segunda marca como sigue (Ginebra "Locomotora" Patricio Ubeda). Pidan siempre Ginebra marca Patricio Ubeda, premiada en las Exposiciones de Hanoi 1902 y S. Luis E. U. A. año 1904 con medallas de Plata y Oro.
SA AKING MGA SUKI
Nang matangi sa tanang mañga kuai, magbuhat ngayon ang aking yaring Ginebra, ay nagtataglay ng pañgaluwang marca gaya ng sumusunod "Ginebra" "Locomotora" Patricio Ubeda. Hinigtagui ang Ginebra Patricio Ubeda na nagkamit sa Exposicion sa Hanoi nang taong 1902 at sa S. Luis E. U. A. ng taong 1904 ay Medalla de Plata at Oro.
Manila 12 de Marzo 1906.
PATRICIO UBEDA.

159 PLAINTIFF'S EXHIBIT "E."

THE UNITED STATES OF AMERICA,
Philippine Islands:

Court of First Instance of the City of Manila.

No. 1233.

PATRICIO UBEDA
versus
AGAPITO ZIALCITA.

I certify that the foregoing labels are identical with those appearing on Exhibit "E." which is a square-faced bottle introduced in evidence in the above-entitled cause.

Manila, March 1, 1907.

(Signed) PEDRO DE TORRES,
Assistant Clerk Court of First Instance, Manila, P. I.

(Here follow labels marked pages 160 and 161.)

162 PLAINTIFF'S EXHIBIT "H."

Government of the Philippine Islands.

(Coat of Arms.)

Executive Bureau.

Division of Archives, Patents, Copyrights, and Trademarks.

To all persons to whom these presents shall come, Greeting:

This is to certify That the annexed is a true copy from the Records of this Division of the Trademark Registered by *by* Patricio Ubeda Gallego April 3rd, 1906, Number 150, for Gins

In testimony whereof I have hereunto set my hand and caused the seal of the Division of Patents, Copyrights, and Trade-Marks to be affixed at the City of Manila this 3rd day of April in the year of our Lord one thousand nine hundred and six.

[SEAL.] (Signed) M. DE IRIARTE,
Chief of Division.

Documentary Stamp: 20 centavos. Name of Executive Bureau, etc stamped across its face

163 No. 150.

The Government of the Philippine Islands.

(Coat of Arms.)

Executive Bureau.

To all to whom these presents shall come:

This is to certify That by the records of the Division of Archives, Patents, Copyrights and Trademarks it appears that Patricio Ubeda Gallego, of Heroacia, Ciudad Real, Spain, did, on the 12 day of March, 1906, deposit in said Division for Registration facsimiles of a certain Trade-mark for Gins, and the date of the receipt thereof was duly noted and recorded; that on the 12 day of March, 1906, it deposited therewith a statement and a written declaration under the oath of Patricio Ubeda Gallego, copies of which are hereto annexed; and the said Patricio Ubeda having made the payment of a fee of Twenty-five Dollars, and complied with the regulations in such cases prescribed by the Chief of Division and in all other respects complied with an Act of United States Philippine Commission approved March 6, 1903, entitled "An Act defining property in Trade-Marks and in Trade Names and providing for the protection of the same, defining unfair competition and providing remedies against

the same, providing registration for Trade-Marks and Trade-Names, and defining the effect to be given to registration under the Spanish Royal Decree of eighteen hundred and eighty-eight relating
164 to the registration of Trade-Marks and the effect to be given to registration under this Act," the said facsimiles, statement, and declaration were duly recorded, and the said Trade-Mark has been duly registered in the said Division of Patents, Copyrights, and Trade-Marks this 3rd day of April, one thousand nine hundred and six, and protection therefor will remain in force for Thirty Years from said date unless sooner terminated in accordance with Section 16 of said Act.

In testimony whereof the seal of the Division of Patents, Copyrights, and Trade-Marks is hereto affixed this 3rd day of April, 1906.

[SEAL.] (Signed) M. DE IRIARTE,
Chief of Division.

Then follows sample of Patricio Ubeda's "Locomotive" label:

165 Then follows a typewritten copy of a certain sworn statement by Patricio Ubeda, which reads:

"Know all men by these presents:

"That I, Patricio Ubeda Gallego, a citizen of Spain and a native of the town of Herencia, Province of Ciudad Real, doing business at No. 210 San Sebastian Street, Manila, have adopted for my own use an industrial mark, of which the following is a complete, clear and exact description: The said trademark consists of a label, circular in shape, 31 millimeters in diameter, in the center of which there is a picture of a locomotive, with smoke issuing from the stack, and above the words 'Marca Registrada' are printed; below the locomotive appears a design or representation of the medals of the Hanoy and St. Louis Expositions. On the face of the medal awarded by the Hanoy Exposition the words 'Republique Francaise' are printed, and on the reverse side of the same medal the date '1902-1903', part of the representation of a pavilion being visible. On the face of the medal awarded by the St. Louis Exposition the following appears: 'Universal Exposition of St. Louis. United States of America', and on the reverse side of the same medal part of the representation of an eagle, which is the national emblem of America, is visible. On the said label there are two concentric circles of gold color, and on the upper half of the label and between these two circles the words 'Ginebra Locomotora' are printed in gilt letters.
166 On the lower half of the said label and between the two circles the words 'Patricio Ubeda Manila' are printed in gilt letters. The essential characteristics of the trademark are the locomotive and the words 'Ginebra Locomotora'.

"This industrial trademark will be used commencing March 12, 1906.

"The article upon which this trademark will be used will be gin

Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 2

put up in square-faced bottles, plain bottles and demijohns, and the wooden boxes in which the same will be packed.

"PATRICIO UBEDA.

"Witnesses:

"O. CAMPOS.
"M. PUJATTO.

"Affidavit.

"Patricio Ubeda Gallego, having been first duly sworn, states that he is the petitioner mentioned in the foregoing declaration; that he firmly believes that the said declaration is correct; that he has today the exclusive use of the above described trademark; that no other person, firm or corporation has the exclusive right to use the said trademark; that no other person, firm or corporation has the right to use the same in any identical form or in any other form which approximately resembles the same and might lead to deceit; that he uses the same in his business, particularly in the Philippine
167 Islands, and that the description and facsimiles submitted by him exactly represent the trademark, the registration of which he petitions for.

"PATRICIO UBEDA.

"Subscribed and sworn to before me, a Notary Public, this 12th day of March, 1906. Affiant exhibited to me his registration certificate No. 1322665, issued by the Collector of Internal Revenue of Manila, January 5, 1906.

"[SEAL.]

"ANTONIO SANZ,
"*Notary Public.*

"My commission expires on the 31st day of December, 1906."

"Documentary Internal Revenue Stamp, P20."

168 PLAINTIFF'S EXHIBIT "J."

Invoice for a case of gin "Dos Campanas", P14.00.
Manila, September 15, 1906.
(Signed) "LA FUERZA".

Stamped with Chinese Chop.
Revenue Stamp 4 centavos.

(Here follows fac-simile invoice, marked page 169.)